United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,944

O'CONNOR BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

KPLT, INC.,

Intervenor.

Appeal from a Decision and Orders of
the Federal Communications Commission

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

O'CONNOR BROADCASTING CORP.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

No. 18,944

CERTIFICATE OF SERVICE

I hereby certify that I have served two copies of the JOINT APPENDIX in the above entitled case, on the following counsel of record:

Robert M. Booth, Jr., Esq.
1100 Vermont Ave., N. W.
Washington, D. C. 20005

Michael Finklestein, Esq.
Federal Communications Commission
Washington, D. C.

B. Austin Newton, Jr., Esq.
Ray R. Paul, Esq.
815 - 15th Street, N. W.
Washington, D. C. 20005

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Amanda Lara

Subscribed and
Sworn to before me this 22 nd Day of April, 965

NATHAN J. PAULSON, Clerk,
United States Court of Appeals
for the District of Columbia Circuit.
By: Paulson A Hardman
Deputy Clerk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JOINT APPENDIX

INDEX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

O'CONNOR BROADCASTING CORPORATION, Appellant,	)	
v.	)	Case No. 18,944
FEDERAL COMMUNICATIONS COMMISSION, Appellee.	)	

PREHEARING STIPULATIONS

Counsel for the respective parties to the above-entitled appeal hereby stipulate as follows:

1. The questions presented by this appeal are as follows:

1. Whether the Commission's conclusion that the need for the proposed service of Station KPLT outweighs the need for the service of existing stations, including Station KTXO, which will be lost by reason of interference from the proposed operation is supported by the evidence.

2. Whether the Commission's reliance upon its policy to encourage Class IV stations to increase daytime power on a nationwide basis was erroneous.

3. Whether the Commission's conclusion that the applicant has made a prima facie case for the grant of its application and that the burden was upon the Appellant to come forward with offsetting evidence was erroneous.

4. Whether the Commission's reference to and reliance upon a pending but ungranted application for an increase in the daytime power of Station KBIX was erroneous.

5. Whether the grant of the application to increase the daytime power of Station KPLT satisfies the fair, efficient and equitable distribution of radio service provision of Section 307(b) and the public interest, convenience and necessity provision of Section 309

of the Communications Act of 1934, as amended.*

6. Whether the Commission's refusal to attach appropriate conditions or waivers to the grant of the application to increase the daytime power of Station KPLT which would permit Appellant to file an application to neutralize or offset the loss of service by its Station KTXO was erroneous.

II. The joint appendix shall be filed within 10 days after the filing of the Appellant's reply brief, or, if the Appellant does not file a reply brief, then within 25 days after the filing of the brief of Appellee.

III. In preparing briefs, the parties shall, when referring to record material, indicate the page or pages in the original record where such material may be found. The pages of the joint appendix shall be consecutively numbered and shall, in addition, bear appropriate record page numbers, so that the reference to the record material printed in the joint appendix may be found.

Respectfully submitted,

/s/ Robert M. Booth, Jr.
Counsel for Appellant
O'CONNOR BROADCASTING
CORPORATION

BOOTH & LOVETT
1735 DeSales Street, N. W.
Washington 36, D. C.

November 16, 1964

/s/ Michael Finklestein
Counsel for Appellee
FEDERAL COMMUNICATIONS
COMMISSION

FEDERAL COMMUNICATIONS
COMMISSION
Washington 25, D.C.

November 16, 1964

/s/ B. Austin Newton, Jr.

and

815 Fifteenth Street, N.W.
Washington 5, D.C.

November 16, 1964

/s/ Ray R. Paul

Counsel for Intervenor
KPLT, INC.

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*Appellee and Intervenor reserved the right to argue that this question is not properly before the Court.

Before: Wright, Circuit Judge,
in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Dated: November 23, 1964

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FCC 63-336
33285

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D.C.

In re Application of

KPLT, INC. (KPLT) Paris, Texas	)	Docket No. 15039 File No. BP-15371
Has: 1490kc, 250w, U, Class IV Requests: 1490kc, 250w, 1kw-LS, U	)	
For Construction Permit	)	

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D.C. on the 10th day of April, 1963;

The Commission having under consideration the above-captioned and described application;

IT APPEARING, That, except as indicated by the issues specified below, the applicant is legally, technically, financially, and otherwise qualified to construct and operate as proposed; and

IT FURTHER APPEARING, That the Commission has on file a "Petition to Deny", by Radion Station KBOX, A Joint Venture, licensee

of Station KBOX, Dallas, Texas, dated July 17, 1962, requesting denial or designation of the subject application for hearing; and a letter from O'Connor Broadcasting Corporation, licensee of Station KTXO, Sherman, Texas, dated April 30, 1962, also requesting designation of the application for hearing; and

IT FURTHER APPEARING, That a grant of the application would result in objectionable interference to the existing operations of Stations KBOX and KTXO; and

IT FURTHER APPEARING, That, in view of the foregoing, the Commission is unable to make the statutory finding that a grant of the subject application would serve the public interest, convenience, and necessity, and is of the opinion that the application must be designated for hearing on the issues set forth below:

IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the application IS DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station KPLT and the availability of other primary service to such areas and populations.

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2. To determine whether the proposal of KPLT, Inc. would cause objectionable interference to Stations KBOX and KTXO, Dallas and Sherman, Texas, respectively, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.
3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

IT IS FURTHER ORDERED, That Radio Station KBOX, A Joint Venture, and O'Connor Broadcasting Corporation, licensees of Stations KBOX and KTXO, respectively, ARE MADE PARTIES to the proceeding.

IT IS FURTHER ORDERED, That the "Petition to Deny" by Radio Station KBOX, A Joint Venture, dated July 17, 1962, IS GRANTED to the extent indicated above and IS DENIED in all other respects.

IT IS FURTHER ORDERED, That in the event of a grant of the application of KPLT, Inc., the construction permit shall contain the following conditions:

> Permittee shall accept such interference as may be imposed by other existing 250 watt Class IV stations in the event they are subsequently authorized to increase power to 1000 watts.
>
> Permittee shall submit with the application for license antenna resistance measurements make in accordance with Section 3.54 of the Commission Rules.

IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicant and parties respondent herein, pursuant ot Section 1.140 of the Commission Rules, in person or by attorney, shall within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.362(b) of the Commission's Rules, give notice of the hearing, within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 1.362(h) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
Ben F. Waple
Acting Secretary

[SEAL]

Released: April 15, 1963

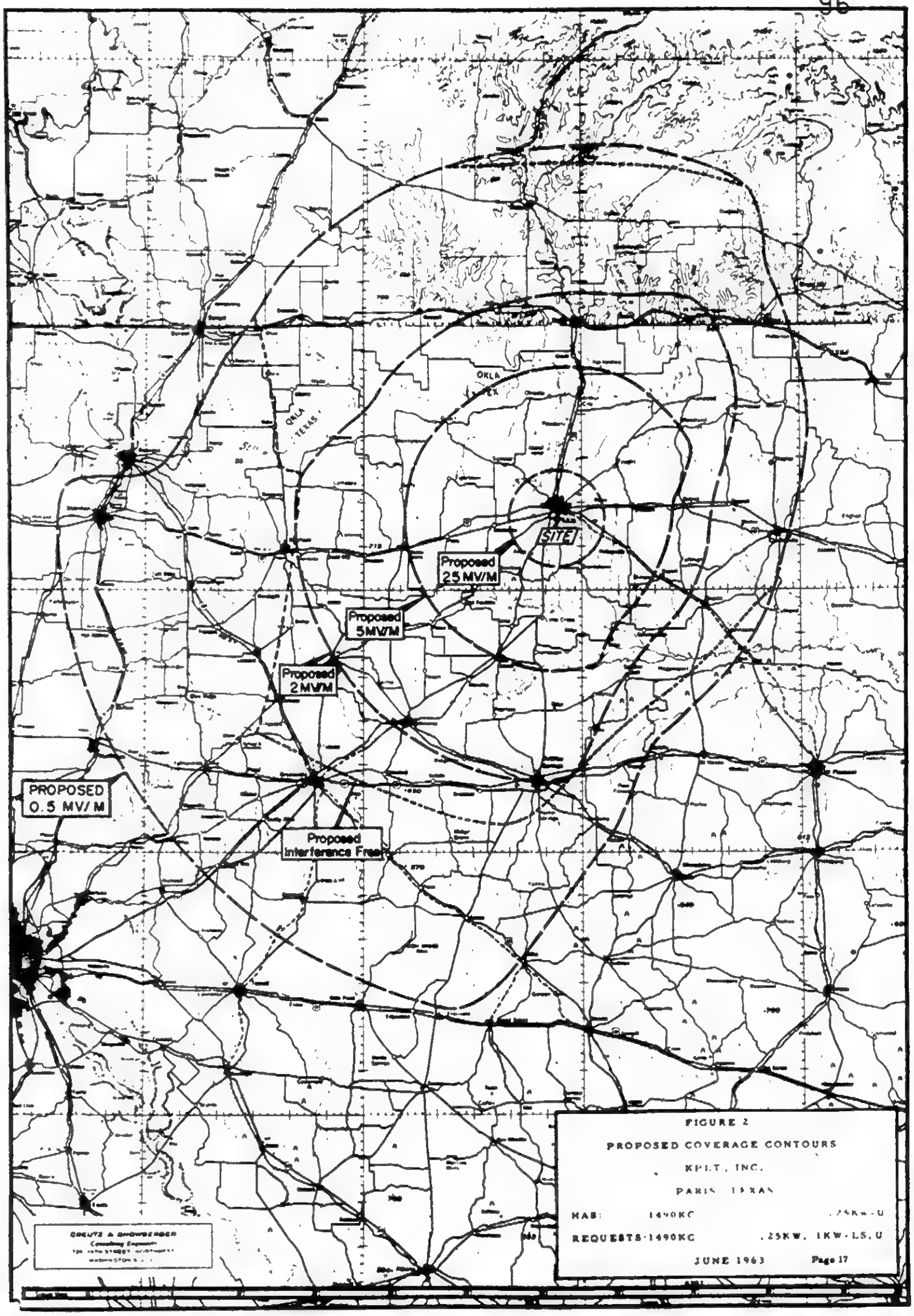

FIGURE 2

PROPOSED COVERAGE CONTOURS

KPLT, INC.

PARIS TEXAS

HAB: 1490KC .25KW-U

REQUESTS 1490KC .25KW, 1KW-LS, U

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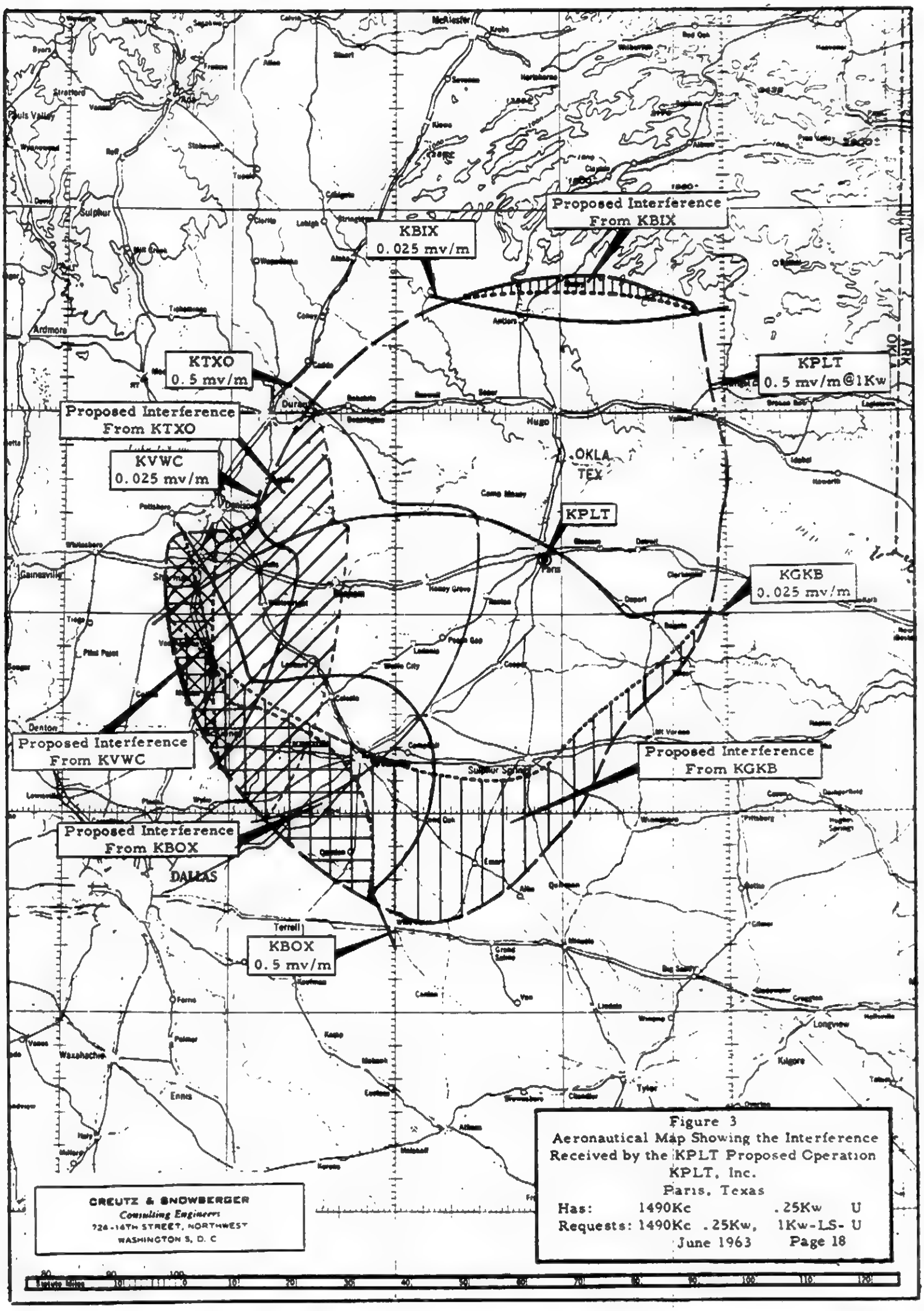

CREUTZ & SNOWBERGER
Consulting Engineers
726-14TH STREET, NORTHWEST
WASHINGTON 5, D. C

Figure 3
Aeronautical Map Showing the Interference Received by the KPLT Proposed Operation
KPLT, Inc.
Paris, Texas

Has:	1490Kc	.25Kw	U
Requests:	1490Kc .25Kw,	1Kw-LS-	U

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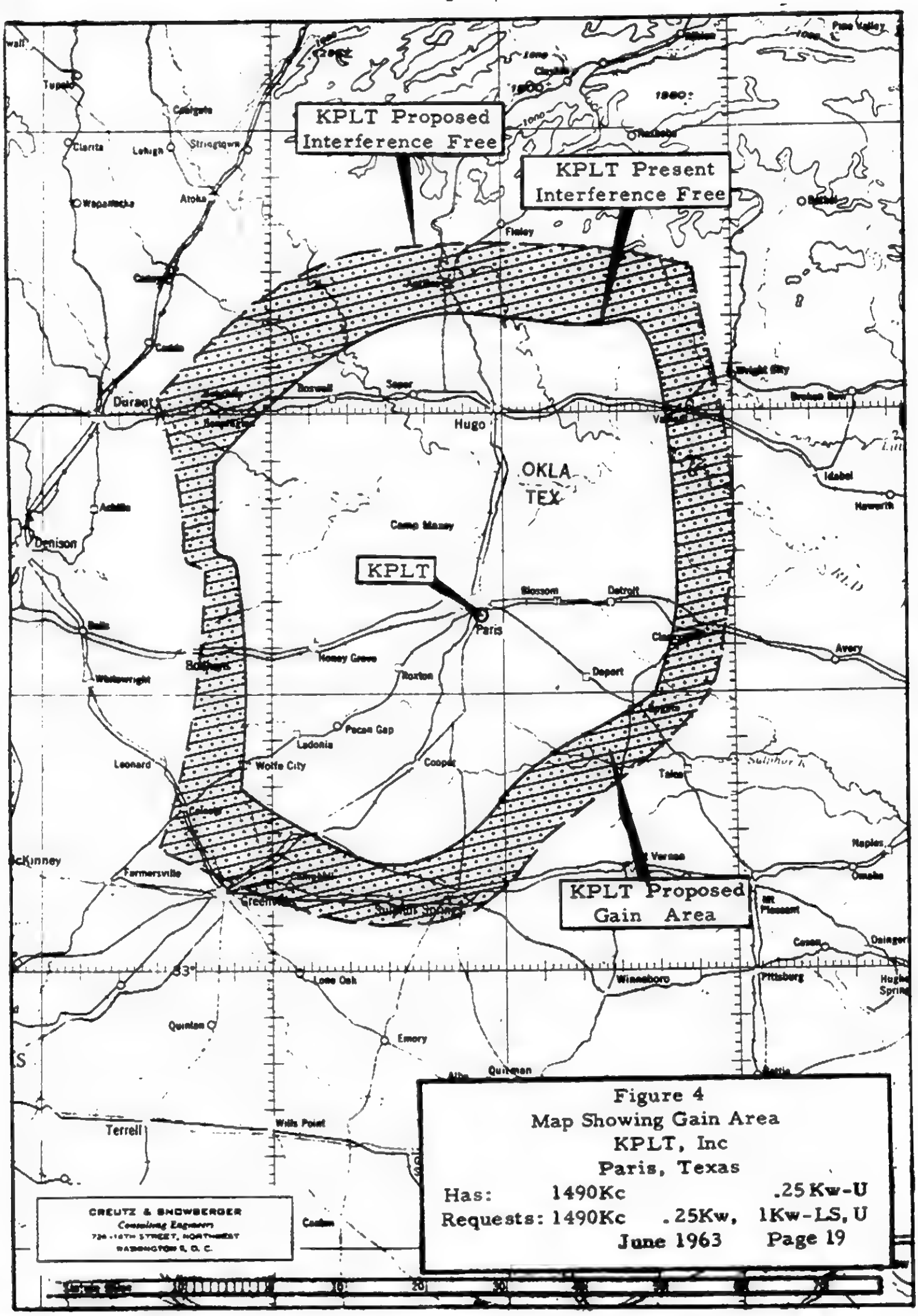

Figure 4
Map Showing Gain Area
KPLT, Inc
Paris, Texas

Has: 1490Kc .25Kw-U
Requests: 1490Kc .25Kw, 1Kw-LS, U
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Figure 5
Tabulations of Populations & Areas
KPLT, Inc
Paris, Texas
Has: 1490Kc .25Kw, U
Requests: 1490Kc .25Kw, 1Kw-LS-U
June 1963

1) KPLT, Paris, Texas

Contour (mv/m)	Present Population	Present Area (Sq. Mi)	Proposed Population	Proposed Area (Sq. Mi)
1000	4	.02	12	.10
25	21,543	36.2	23,051	113
5	28,599	506.4	36,646	1119
2	46,072	1510	68,626	2713
0.5	87,519	4404	145,48[illegible]	7532
Interference Received				
KGKB only	4,866	548	15,106	940
KTXO only	5,892	323	14,389	822
KBIX only	-----	---	588	97
KGKB, KBOX (Common Area)	799	79	3,888	296
KGKB, KBOX, KTXO (Common Area)	1,545	89	6,851	211
KGKB, KTXO (Common Area)	5,179	159	1,438	27
KGKB, KTXO, KVWC (Common Area)	201	15	-----	---
KXTO, KVWC (Common Area)	-----	----	1,398	69
KGKB, KTXO, KVWC, KBOX	-----	----	4,06[illegible]	77
KBOX, KTXO, KVWC	-----	----	1,31[illegible]	74

Figure 5 (Continued)

	Present		Proposed	
	Population	Area (Sq. Mi)	Population	Area (Sq. Mi)
Interference Received				
Total Interference Received Present	18,482 (21.1%)	1,213 (27.5%)		
Total Present Interference-Free	69,037	3,191		
Total Interference Received Proposed			49,337 (33.7%)	2,613 (34.5%)
Total Proposed Interference-Free			96,152	4,919
Total Gain with 1Kw			27,115	1,728

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Figure 6A
Tabulations Of Other 2 mv/m Or Better Services
In Towns Or Cities Of 2500 Population Or More
That Receive a 2 mv/m Or Better Signal From KPLT
KPLT Inc.
Paris, Texas

Has:	1490Kc		.25Kw	U
Requests:	1490Kc	.25Kw	1Kw-LS-	U

June 1963

City of Paris, Texas:

Station	Location	Amount Served
Proposed KPLT	Paris, Texas	100%
KIHN 1340Kc, 250W-U	Hugo,Oklahoma	100%
KFTV 1250Kc, 500W-D	Paris, Texas	100%

City of Hugo,Oklahoma.

Station	Location	Amount Served
Proposed KPLT	Paris, Texas	100%
KIHN 1340Kc, 250W-U	Hugo, Oklahoma	100%
KFTV 1250Kc, 500W-D	Paris, Texas	100%

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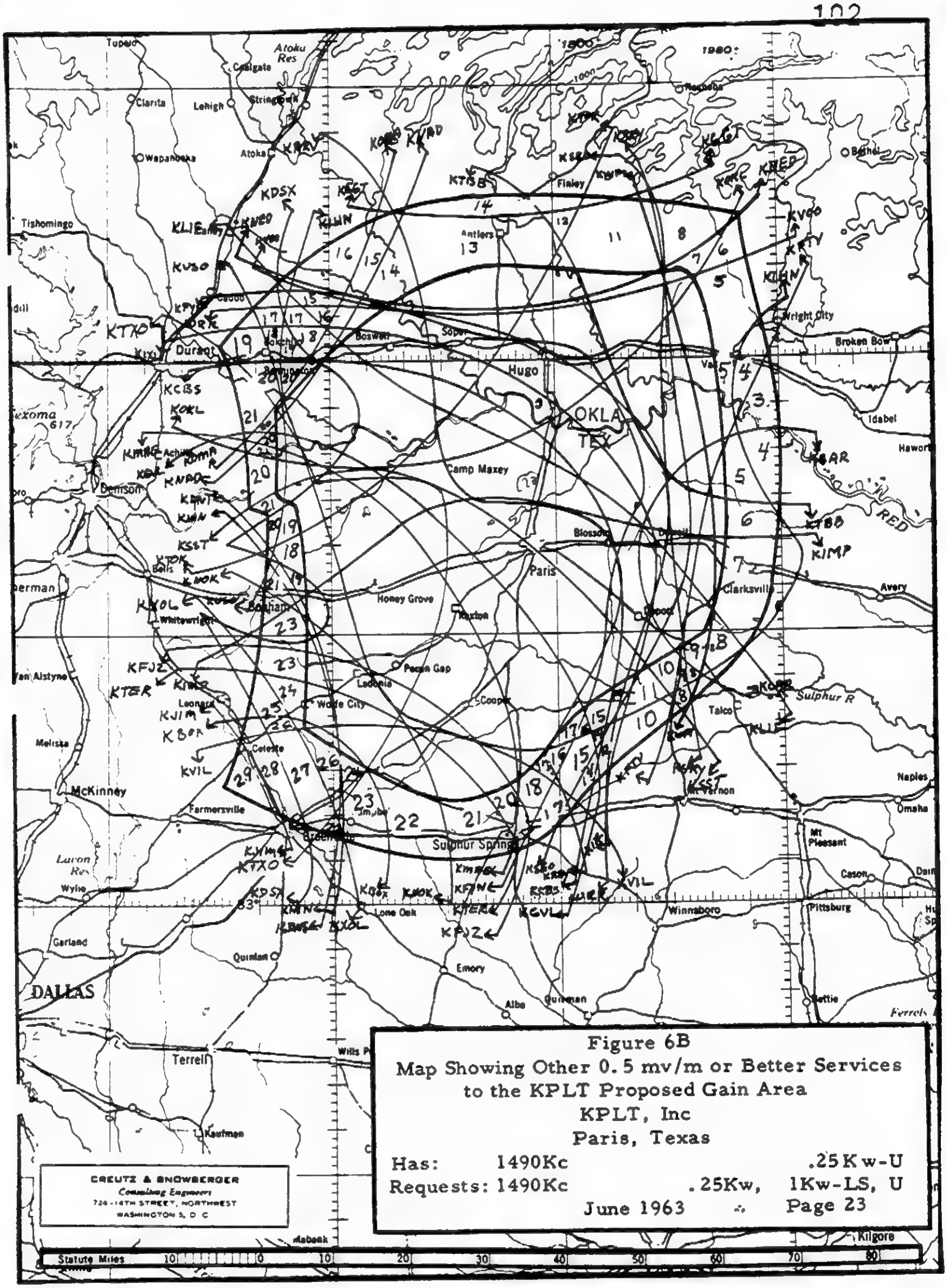

Figure 6B
Map Showing Other 0.5 mv/m or Better Services
to the KPLT Proposed Gain Area
KPLT, Inc
Paris, Texas

Has: 1490Kc .25Kw-U
Requests: 1490Kc .25Kw, 1Kw-LS, U

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CREUTZ & SNOWBERGER
Consulting Engineers
720 - 14TH STREET, NORTHWEST
WASHINGTON 5, D C

Figure 7
Tabulation of Other Services
KPLT, Inc
Paris, Texas
Has: 1490Kc .25Kw U
Requests: 1490Kc .25Kw 1Kw-LS-U
June 1963

Station	Location	Day Facility Freq. (kc)	Day Facility Power (kc)	Portion of Area Served (%) 0-25	25-50	50-75	75-100	100
WBAP	Fort Worth, Texas	570	5.0					X
KTBB	Tyler, Texas	600	1.0				X	
KWFT	Wichita Falls, Texas	620	5.0			X		
WNAD	Norman, Oklahoma	640	1.0	X				
KSKY	Dallas, Texas	660	1.0			X		
KGGT	Coffeyville, Kansas	690	10.0	X				
KCBS	Grand Prairie, Texas	730	0.5		X			
KSEO	Durant, Oklahoma	750	0.25			X		
KJIM	Fort Worth, Texas	870	0.25	X				
KRRV	Sherman, Texas	910	1.0			X		
WKY	Oklahoma City, Oklahoma	930	5.0	X				
KDSX	Denison-Sherman, Texas	950	0.5	X				
KIMP	Mount Pleasant, Texas	960	1.0		X			
KNOK	Fort Worth, Texas	970	1.0	X				
KNIN	Wichita Falls, Texas	990	10.0	X				
KTOK	Oklahoma City, Oklahoma	1000	5.0		X			
KIXL	Dallas, Texas	1040	1.0		X			
KRLD	Dallas, Texas	1080	50.0					X
KVIL	Highland Park, Texas	1150	1.0	X				
KFAA	Dallas, Texas	820	50.0					X

Figure 7 (Continued)

1 2 3	Station	Location	Day Facility Freq. (kc)	 Power (kc)	Portion of Area Served (%) 0 25	 25 50	 50 75	 75 100	 100
4	KNED	McAlester, Oklahoma	1150	1.0	X				
5	KVOO	Tulsa, Oklahoma	1170	50.0	X				
6	KLIF	Dallas, Texas	1190	50.0			X		
7	KSST	Sulphur Springs, Texas	1230	0.25		X			
8	KOKL	Okmulgee, Oklahoma	1240	1.0		X			
9	KUSO	Ardmore, Oklahoma	1240	1.0	X				
10	KFTV	Paris, Texas	1250	0.5				X	
11	KFJZ	Fort Worth, Texas	1270	5.0	X				
12	WRR	Dallas, Texas	1310	5.0			X		
13	KIHN	Hugo, Oklahoma	1340	0.25			X		
14	KCAR	Clarksville, Texas	1350	0.5	X				
15	KXOL	Fort Worth, Texas	1360	0.5	X				
16	KGVL	Greenville, Texas	1400	0.25		X			
17	KFYN	Bonham, Texas	1420	0.25			X		
18	KDNT	Denton, Texas	1440	1.0	X				
19	KOMA	Oklahoma City, Oklahoma	1520	50.0	X				
20	KTER	Terrell, Texas	1570	0.25	X				
21	KMAE	McKinney, Texas	1600	1.0			X		
22	KBOX	Dallas, Texas	1480	5.0	X				
23	KXTO	Sherman, Texas	1500	0.25		X			
			TOTALS		18	8	9	2	3

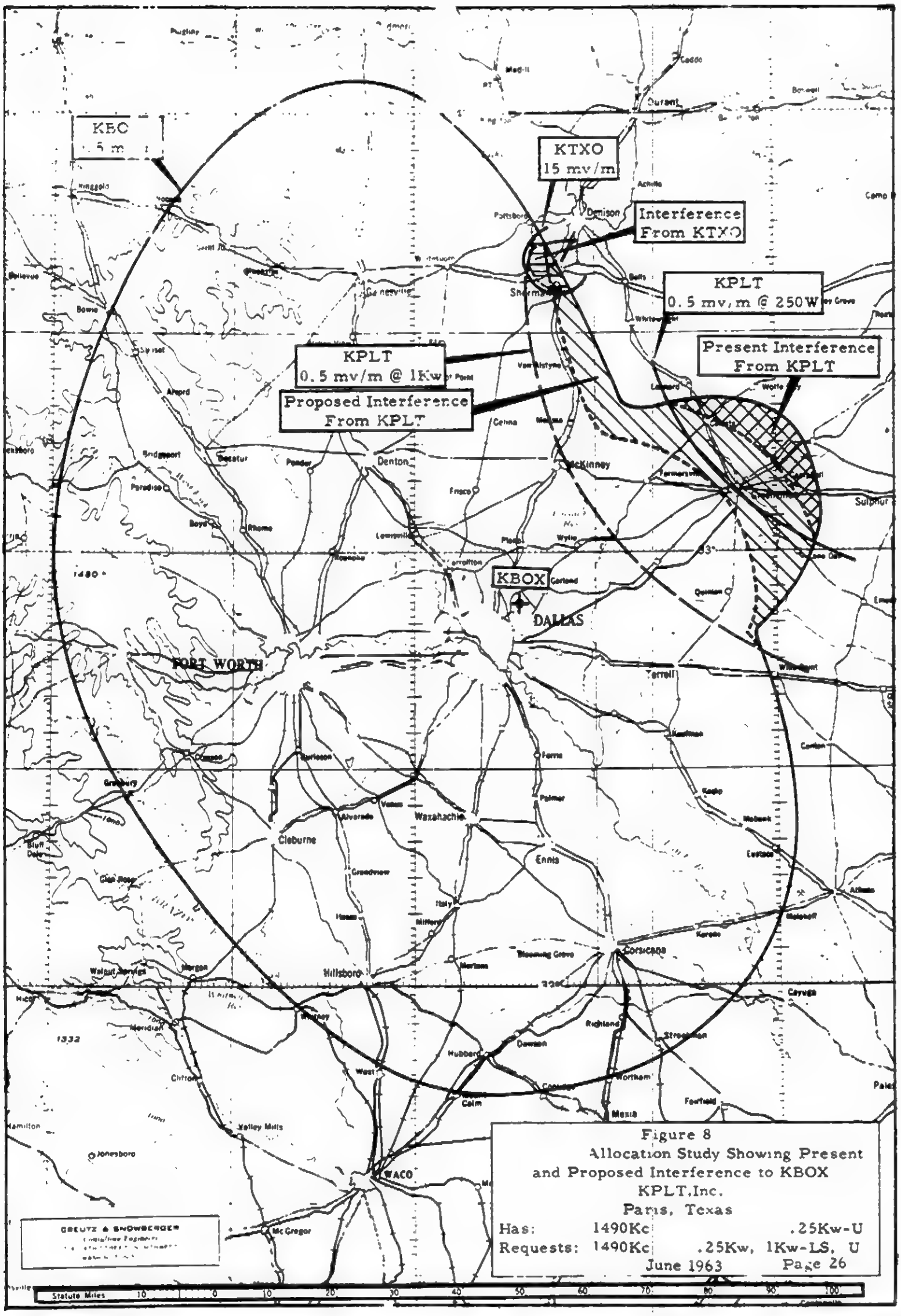

Figure 8
Allocation Study Showing Present
and Proposed Interference to KBOX
KPLT,Inc.
Paris, Texas

Has:	1490Kc	.25Kw-U
Requests:	1490Kc	.25Kw, 1Kw-LS, U

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Figure 9
Tabulation of Population and Area
KBOX, Dallas, Texas
1480Kc 5-0.5N DA-2
June 1963

Contour	Population	Area (Sq. Mi)
0.5	1,665,687	13,910
Present Interference from KPLT	1,452	129
	(.08%)	(.9%)
Present Interference from KTXO	469	22
	(.028%)	(.01%)
Present Interference-Free	1,663,766	13,759
Proposed Interference from KPLT	9,820	630
	(.58%)	(4.5%)
Additional Interference from KTXO	289	12
	(.017%)	
Proposed Interference-Free	1,655,578	13,268

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Figure 10
Tabulation Of Other 100% Services Available
To The KBOX Interference Area From KPLT

KPLT, Inc
Paris, Texas

Has: 1490Kc .25Kw U
Requests: 1490Kc .25Kw 1Kw-LS U

June 1963

	Station	Location	Day Facility Freq. (Kc)	Power (Kw)
1	WBAP-S	Fort Worth, Texas	570	5.0
2	WFAA-S	Dallas, Texas	570	5.0
3	KTBB	Tyler, Texas	600	1.0
4	KWFT	Wichita Falls, Texas	620	5.0
5	KSKY	Dallas, Texas	660	1.0
6	KCBS	Grand Prairie, Texas	730	0.5
7	KSEO	Durant, Oklahoma	750	0.25
8	WBAP-S	Fort Worth, Texas	820	50.0
9	WFAA-S	Dallas, Texas	820	50.0
10	KRRV	Sherman, Texas	910	1.0
11	KNOK	Fort Worth, Texas	970	1.0
12	KIXL	Dallas, Texas	1040	1.0
13	KRLD	Dallas, Texas	1080	50.0
14	KLIF	Dallas, Texas	1190	50.0
15	WRR	Dallas, Texas	1310	5.0
16	KXOL	Fort Worth, Texas	1360	5.0
17	KGVL	Greenville, Texas	1400	0.25
18	KFYN	Bonham, Texas	1420	0.25

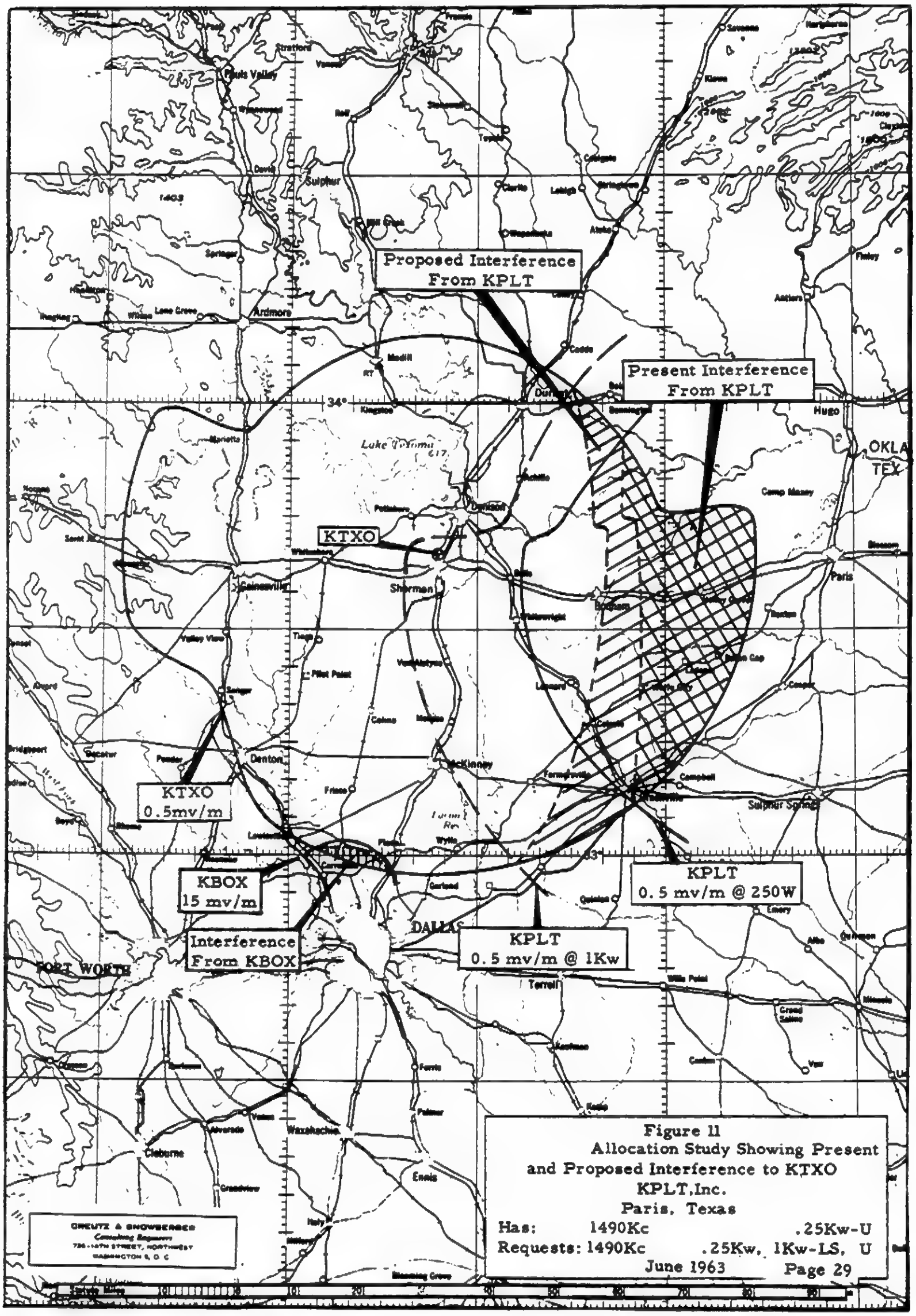

Figure 11
Allocation Study Showing Present and Proposed Interference to KTXO
KPLT,Inc.
Paris, Texas

Has: 1490Kc .25Kw-U
Requests: 1490Kc .25Kw, 1Kw-LS, U

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Figure 12
Tabulation of Population and Area
KTXO Sherman, Texas
1500Kc 250W Day
June 1963

Contour	Population	Area (Sq. Mi)
0.5	151,869	5,761
Present Interference from KPLT	12,002	645
	(7.9%)	(11%)
Present Interference from KBOX	557	17
	(.3%)	(.29%)
Present Interference-Free	139,310	5,099
Proposed Interference from KPLT	20,409	1,103
	(13%)	(.19%)
Proposed Interference from KBOX	557	17
	(.3%)	(.29%)
Proposed Interference-Free	130,903	4,641

Figure 13
Tabulation Of Other 100% Services Available
To The KTXO Interference Area From KPLT
KPLT, Inc
Paris, Texas

Has: 1490Kc .25Kw U
Requests: 1490Kc .25Kw 1Kw-LS - U
June 1963

	Station	Location	Day Facility Freq. (Kc.)	Day Facility Power (Kw)
1	WBAP-S	Fort Worth, Texas	570	5.0
	WFAA-S	Dallas, Texas	570	5.0
2	KTBB	Tyler, Texas	600	1.0
3	KWFT	Wichita Falls, Texas	620	5.0
4	KSKY	Dallas, Texas	660	1.0
5	KCBS	Grand Prairie, Texas	730	0.5
6	KSEO	Durant, Oklahoma	750	0.25
7	WBAP-S	Fort Worth, Texas	820	50.0
	WFAA-S	Dallas, Texas	820	50.0
8	KRRN	Sherman, Texas	910	1.0
9	KIXL	Dallas, Texas	1040	1.0
10	KRLD	Dallas, Texas	1080	50.0
11	KLIF	Dallas, Texas	1190	50.0
12	WRR	Dallas, Texas	1310	5.0
13	KFYN	Bonham, Texas	1420	0.25

PRESENT INTERFERENCE
FROM KHUZ, KZZN & KCTX

KPLT
0.025 MV/M @ 1KW

KVWC

OKLA

TEX

KHUZ
0.025 MV/M

KVWC
0.5 mv/m

Proposed Interference
From KPLT

CREUTZ & SNOWBERGER
Consulting Engineers
724-14TH STREET, NORTHWEST
WASHINGTON 5, D. C.

Figure 14
Allocation Study Showing Proposed
Interference to KVWC
KPLT, Inc.
Paris, Texas

Has: 1490Kc .25Kw-U
Requests: 1490Kc .25Kw, 1Kw-LS, U
June 1963 Page 32

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Figure 15
Tabulation of Population and Area
KVWC Vernon, Texas
1490Kc 250W U
June 1963

	Contour	Population	Area (Sq. Mi)
2	0.5	73,317	8,237
3 4	Present Interference from KHUZ, KZZN, and KCTX	5,117 (6.9%)	959 (11.6%)
5 6	Proposed Interference from KHUZ, KZZN and KCTX	5,117	959
7	Proposed Interference from KPLT	4,208 (5.7%)	311 (3.7%)
8	Present Interference-Free	68,200	7,278
9	Proposed Interference-Free	63,992	6,967

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Figure 16
Tabulation Of Other 100% Services Available
To The KVWC Interference Area From KPLT
KPLT, Inc
Paris, Texas

Has:	1490Kc	.25Kw	U
Requests:	1490Kc .25Kw	1Kw-LS -	U

June 1963

	Station	Location	Day Facility Freq. (Kc)	Day Facility Power (Kw)
1	KWFT	Wichita Falls, Texas	620	5.0
2	KGNC	Amarillo, Texas	710	10.0
3	WBAP	Fort Worth, Texas	820	50.0
4	KOLJ	Quanah, Texas	1150	0.5
5	KTRN	Wichita Falls, Texas	1290	5.0

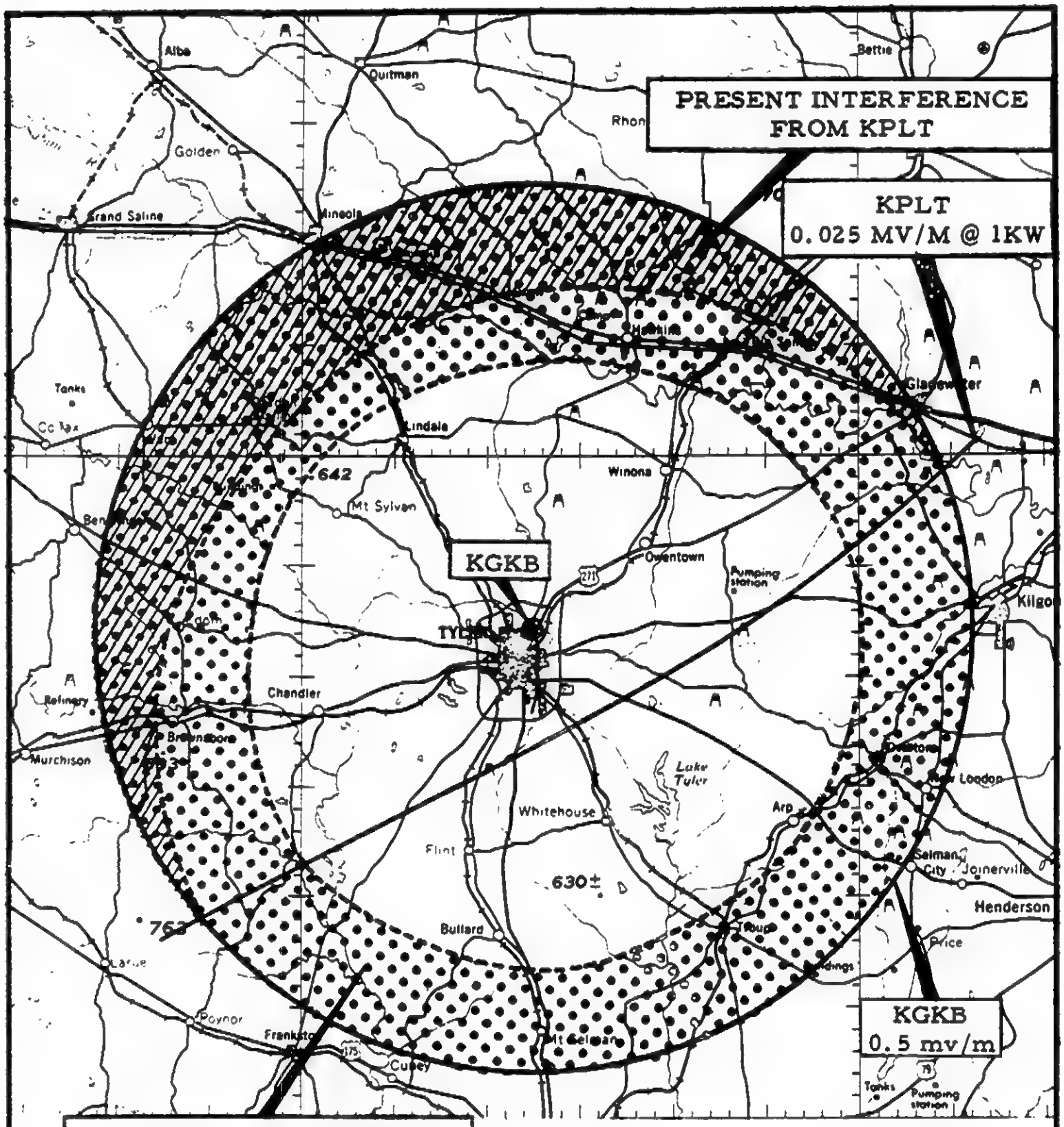

Figure 17
Allocation Study Showing Present and Proposed Interference to KGKB
KPLT, Inc.
Paris, Texas

Has: 1490Kc .25Kw-U
Requests: 1490Kc .25Kw, 1Kw-LS, U

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Figure 18
Tabulation of Population and Area
KGKB, Tyler, Texas
1490Kc 250W U
June 1963

Contour	Population	Area (Sq. Mi)
0.5	102,378	1661
Present Interference from KPLT	5,179 (5.05%)	286.5 (17%)
Proposed Interference from KPLT	21,137 (20.6%)	779 (46%)
Present Interference-Free	97,199	1374.5
Proposed Interference-Free	81,241	882

Figure 19
Tabulation Of Other 100% Services Available
To The KGKB Interference Area From KPLT

KPLT Inc.
Paris, Texas

Has: 1490Kc .25Kw U
Requests: 1490Kc .25Kw 1Kw-LS- U

June 1963

	Station		Locations	Day Facility Freq. (Kc)	Day Facility Power (Kw)
1					
2					
3					
4	1	KTBB	Tyler, Texas	600	1.0
5	2	WTIX	New Orleans, Louisiana	690	5.0
6	3	KZEY	Tyler, Texas	690	0.25
7	4	KEEL	Shreveport, Louisiana	710	50.0
8	5	WBAP	Fort Worth, Texas	820	50.0
9	6	KDOK	Tyler, Texas	1330	1.0

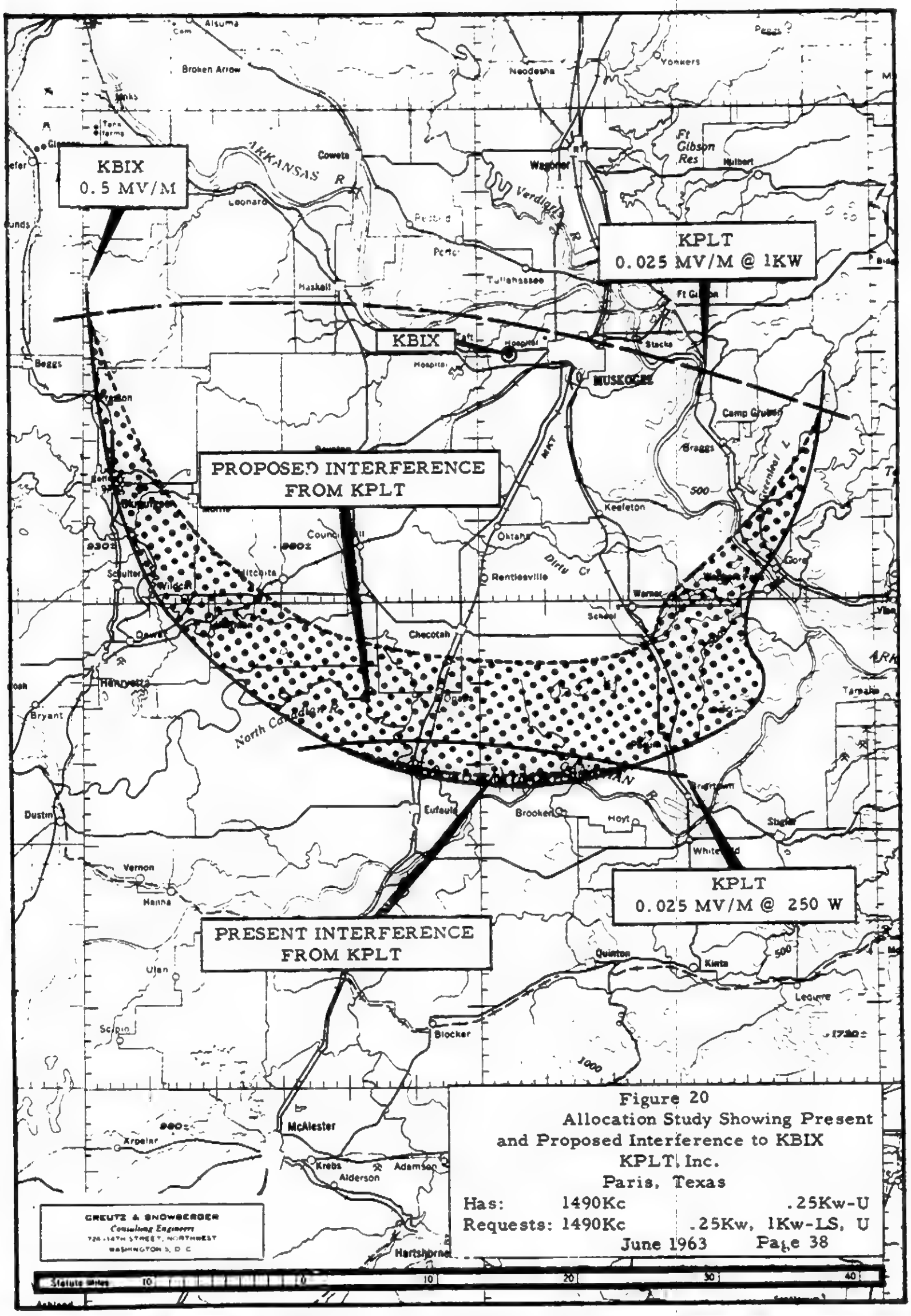

Figure 20
Allocation Study Showing Present
and Proposed Interference to KBIX
KPLT, Inc.
Paris, Texas

Has: 1490Kc .25Kw-U
Requests: 1490Kc .25Kw, 1Kw-LS, U

June 1963 Page 38

Figure 21
Tabulation of Population and Area
KBIX Muskogee, Oklahoma
1490Kc 250W U
June 1963

	Contour	Population	Area (Sq. Mi)
2	0.5	95,456	2,567
3	Present Interference from KPLT	235 (.24%)	10 (.38%)
4	Present Interference-Free	95,221	2,557
5	Proposed Interference from KPLT	7,022 (7.3%)	440 (17.1%)
6	Proposed Interference-Free	88,434	2,127

Figure 22
Tabulation Of Other 100% Services Available
To The KBIX Interference Area From KPLT
KPLT, Inc
Paris, Texas
Has: 1490Kc .25Kw U
Requests: 1490Kc .25Kw 1Kw-LS-U
June 1963

1		Station	Location	Day Facility	
2				Freq.	Power
3				(Kc)	(Kw)
4	1	KAKC	Tulsa, Oklahoma	970	1.0
5	2	KVOO	Tulsa, Oklahoma	1170	50.0
6	3	KTRN	Wichita Falls, Texas	1290	5.0
7	4	KOME	Tulsa, Oklahoma	1300	5.0
8	5	KMUS	Muskogee, Oklahoma	1380	1.0

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KPLT
Ex. 1A

Engineering Statement
KPLT, Inc
Paris, Texas
Has 1490Kc, 250W-U, Requests 250W-N, 1000W-D
Docket No. 15039 File No. BP-15371
June 1963

Engineering Statement Corrections

The data contained herein is to correct certain portions of the Engineering Statement prepared on behalf of KPLT, Inc., Docket 15039, on the Affidavit of the undersigned dated June 6, 1963.

1st Correction.

Page 3, line 16, should read starting at "there are a total of 43 stations combined to provide a minimum of 4 and a maximum of 30."

2nd, Correction

On Page 6, line 8, change to "there are 11 other stations."

3rd Correction

On Page 22, Figure 6A, add the following stations supplying 2 mv/m or better signals to the city of Paris, Texas :-

WBAP (S) 820Kc, 50Kw, Fort Worth, Texas, 100%

WFAA (S) 820Kc, 50Kw, Dallas, Texas, 100%

KRLD 1080Kc, 50Kw, Dallas, Texas, 100%

The previously listed stations also serve the city of Hugo, Oklahoma, with a 2 mv/m or better signal.

4th Correction

Remove Page 23, Figure 6B, and replace with attached Page 23, Figure 6B (revised).

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5th Correction

On Page 25 add the following stations :-

Station	Location	Day Facility Freq. (kc)	Day Facility Power (kw)	Portion of Area Served (%) 0 25	25 50	50 75	75 100	100
KWKH	Shreveport, Louisiana	1130	50.0	X				
KBEL	Idabel, Oklahoma	1240	1.0	X				
KCUL	Fort Worth, Texas	1540	50.0		X			
Also change the totals on Page 25 to the following :-				20	9	9	2	3

6th Correction

Page 24, line 23 should read WFAA

7th Correction

On Page 30, Figure 12, line 9, change to 19%.

8th Correction

On Page 31, Figure 13, delete lines 6 and 14.

9th Correction

On Page 34, Figure 16, delete lines 5 and 7 and add :-

WFAA, Dallas, Texas 820Kc, 50Kw
KRLD, Dallas, Texas 1080Kc, 50Kw

10th Correction

On Page 37, Figure 19, delete all of line 5 and add:-

WFAA, Dallas, Texas 820Kc, 50Kw.

ARTHUR A. SNOWBERGER

Subscribed and sworn to before me this 19th day of June, 1963.

NOTARY PUBLIC

My Commission expires:September 14, 1966.

CREUTZ & SNOWBERGER
CONSULTING ENGINEERS

[Released: F.C.C. , July 25, 1963]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 63D-87
38853

In re Application of:	)	
KPLT, INC. (KPLT) Paris, Texas	)	DOCKET NO. 15039 File No. BP-15371
For Construction Permit	)	

Appearances

On behalf of the applicant, KPLT, Inc. (KPLT), Mr. Ray R. Paul (Prince and Paul); on behalf of respondent Radio Station KBOX, A Joint Venture, Mr. David S. Stevens; on behalf of respondent O'Connor Broadcasting Corporation (KTXO), Messrs. John L. Tierney and Robert M. Booth, Jr.; and on behalf of the Broadcast Bureau, Federal Communications Commission, Mr. Joseph D. Greene.

INITIAL DECISION OF HEARING EXAMINER DAVID I. KRAUSHAAR

Preliminary Statement

1. Applicant is presently the licensee of standard broadcast station KPLT, Paris, Texas, which operates on the frequency 1490 kilocycles (Class IV), unlimited time, with 250 watts power. Applicant is seeking authorization herein to increase the power of Station KPLT to one kilowatt during the daytime only and to operate as heretofore at night. Inasmuch as it appeared that operating as proposed Station KPLT would cause objectionable interference to Class III Station KBOX, Dallas, Texas and to Class II Station KTXO, Sherman, Texas, the Commission, by order released April 15, 1963 (FCC 63-336), designated the application for hearing on the following issues:

1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station KPLT and the availability of other primary service to such areas and populations.

2 To determine whether the proposal of KPLT, Inc. would cause objectionable interference to Stations KBOX and KTXO, Dallas and Sherman, Texas, respectively, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

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3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

2. In its order of designation the Commission named as parties to this proceeding Radio Station KBOX, A Joint Venture, the licensee of Station KBOX and O'Connor Broadcasting Corporation, the licensee of Station KTXO. These respondents have appeared at the hearing but have adduced no evidence.

3. The order of designation specifies that in the event of a grant of the KPLT application the construction permit shall contain the following conditions:

> Permittee shall accept such interference as may be imposed by other existing 250 watt Class IV stations in the event they are subsequently authorized to increase power to 1000 watts.
>
> Permittee shall submit with the application for license antenna resistance measurements made in accordance with Section 3.54 of the Commission's Rules.

4. By Order of the Acting Chief Hearing Examiner released April 16, 1963 (FCC 63M-461) the undersigned Hearing Examiner was assigned to preside at the hearing in this proceeding, prehearing

conference was to be convened May 22, and the hearing was scheduled to commence June 25. Due to a calendar conflict the Examiner advanced and rescheduled the prehearing conference, which took place on May 17 (See orders released May 3, FCC 63M-520 and May 17, FCC 63M-571, respectively.) The hearing itself was held June 25 as originally scheduled and the record was duly closed. KPLT's presentation, consisting of its Exhibits 1 and 1A, was entirely in written form and was admitted into evidence without objection or cross-examination. Essentially, therefore, there was no dispute among the parties as to what the facts are. Proposed findings of fact and conclusions of law were filed July 23rd by all parties.

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Findings of Fact [1/]

5. As noted, standard broadcast station KPLT presently operates on the frequency 1490 kilocycles (Class IV) with 250 watts power, unlimited time, at Paris, Texas (pop. 20,977). The present proposal calls for an increase in daytime power to one kilowatt without change in the station's nighttime operation.

6. The coverage, present and proposed, for Station KPLT is tabulated as follows: [2/]

Contour (mv/m)	Population	Area (sq. mi.)
Present		
0.5 (normally-protected)	87,519	4,404
Interference (from KGKB, KTXO, KBOX) received (total)	18,482 (21.1%)*	1,213 (27.5%)*
Interference-free	69,037	3,191
Proposed		
0.5 (normally-protected)	145,489	7,532
Interference (from KGKB, KTXO, KBIX, KBOX, KVWC) received (total)	49,337 (33.7%)*	2,613 (34.5%)*

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Interference-free	96,152	4,919

*Note: Percentages refer to populations within the 0.5 mv/m, normally protected, contour.

1/ All population data are derived from the official 1960 U. S. Census.

2/ There is evidence physically in the record — stricken voluntarily, however, by applicant (T.27, Ex. 1, page 20) — which breaks down in detail the extent of interference received, identifying common areas of interference caused by two or more stations. It is superfluous for the tabulation in the text to reflect this. Thus, only the total extent of the interference applicant's station presently suffers, and will suffer under its proposal, is shown above.

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7. It thus appears that operating as proposed Station KPLT will provide new primary service during the daytime (0.5 mv/m or greater) to an area of 1,728 square miles and to a total population of 27,115 which the station does not now serve. It likewise appears that no persons who presently receive daytime primary service from Station KPLT will lose such service in the event of a grant. Additionally — included in the 27,115 population which is to gain service from Station KPLT — KPLT will bring additional (a fifth) primary service (2.0 mv/m or greater) to the city of Hugo, Oklahoma (1960 U. S. pop. 6,287), the only urban community to which proposed KPLT would provide such service. 3/ A minimum of four (4) and a maximum of thirty (30) other primary services are presently available from 43 stations to all portions of the rural areas which would gain service from Station KPLT in the event of grant. There are at least 8 services available in 70 percent of the gain area and one rural district in the vicinity of Celeste, Texas has as many as 29.

8. Operating as proposed Station KPLT will cause additional objectionable interference, adjacent-channel, to Station KBOX, Dallas, Texas (1480 kc/s, 5 Kw-D/0.5 Kw-N, DA-2, U), a Class III station, and to Station KTXO, Sherman, Texas (1500 kc/s, 250w, Day), a Class II station. At the present time Station KBOX suffers interference from

Station KPLT in an area of 129 square miles with a population of 1,452, representing .09% of the population (1,665,687) and 0.9% of the area (13,910 square miles) within its 0.5 mv/m, normally-protected, contour. Additional objectionable interference to that station under the KPLT proposal will affect a population of 8,368 in 501 square miles, thereby resulting in a total loss to KBOX (including loss due to existing interference from Station KTXO) of 0.6% of the population and 5.5% of the area within that station's normally protected (0.5 mv/m) contour. At present Station KTXO suffers interference from Station KPLT in an area of 645 square miles with a population of 12,002 and from Station KBOX in an area of 17 square miles with a population of 557, representing approximately 8.0% of the population (151,869) within its 0.5 mv/m, normally-protected, contour. Additional objectionable interference to

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3/ Stations WBAP and WFAA, both operating with 50 kilowatts of power from Fort Worth and Dallas, Texas, respectively, serve Hugo, Oklahoma when utilizing the 820 kc/s frequency on a share-time basis. Station KRLD, another 50 kw station in Dallas, on the frequency 1080 kc/s, also serves Hugo. In addition, Stations KIHN in Hugo and KFTV in Paris (on 1340 and 1250 kc/s, respectively) provide primary service to Hugo.

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that station from the KPLT proposal will affect a population of 8,407 in 458 square miles, thereby increasing the pertinent percentage to 13% of the total population (to 19% of the area) within its 0.5 mv/m, normally-protected, contour.

9. Interference to Station KBOX at the present time is located in an area (fairly close to the periphery of the KBOX 0.5 mv/m contour) in the vicinity of Campbell, some 42 miles east-northeast of the KBOX transmitter site. Objectionable interference from proposed KPLT would affect an additional area five miles closer to the Station KBOX transmitter site in the vicinity of Greenville, Texas, extending northward to Sherman and southward to within approximately six miles of Will Point,

Texas. No point within the new area of interference is located nearer than 30 miles to Station KBOX or farther than 49 miles therefrom. This area is located no closer than about 43 miles nor farther than 64 miles from Station KPLT's site.

10. The portion of the area now served by Station KTXO which would lose such service upon a grant of the KPLT application consists of a strip at the eastern edge of the KTXO service area. This strip runs in a north to south direction from Durant, Oklahoma passing just east of Bonham, Texas and just west of Greenville ending in the vicinity of Royse City, Texas. The strip has a length of some 60 miles and a width ranging from 5 to 20 miles. With respect to the Station KTXO transmitter site the closest point is 25 miles and the farthest is 49 miles. With respect to the Station KPLT site the closest point is 28 miles and the farthest point is 48 miles.

11. Sixteen (16) other stations provide primary service (0.5 mv/m or greater) to the entire additional area of objectionable interference to Station KBOX. Eleven (11) other stations provide such service to the entire additional area that would be lost to Station KTXO.

12. Operating as proposed Station KPLT will also cause interference, co-channel, to Class IV stations KVWC, Vernon, Texas (1490 kc, 250 watts, U), KGKB, Tyler, Texas (1490 kc, 250 watts, U), and to KBIX, Muskogee, Oklahoma (1490 kc, 250 watts, U). In each such instance at least four stations other than the interfered-with station provide primary service (0.5 mv/m or greater) to all of each interference area involved. It is unnecessary for this initial decision to detail the extent of the interference affecting these three 250-watt Class IV stations although such a study has been set forth in KPLT Ex. 1

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in evidence. See Booth Broadcasting Co. (WIOU), 31 FCC 392, 396; and Conclusions, infra, par. 13. [4/]

Conclusions

13. The only question of significance is whether an existing Class IV station, KPLT, may be permitted to increase daytime power to one kilowatt at the cost of resultant adjacent channel objectionable interference to other classes of stations. For the Commission's policy, now well settled, is affirmatively to encourage Class IV stations to improve their daytime coverage by increasing power to one kilowatt, in general irrespective of the interference which may result to other Class IV's still operating at lesser powers. The rationale of the policy has been discussed elsewhere. It need not be repeated. WSTV, Inc., 31 FCC 694, 695, 707, 708; Clinton Broadcasting Corporation (KROS), 32 FCC 367, 368, 375, 376. 5/

14. It is not open to dispute that if KPLT's present application is granted additional objectionable interference, adjacent-channel in character, will result to Station KBOX, a Class III station, and to KTXO, a Class II station; that a grant will result in substituting service from KPLT for service from the interfered-with stations in the new interference areas; that the interference areas already receive primary service from many stations other than the interfered-with stations; and that in both instances the interference areas are located relatively close to the peripheries of the present service areas of Stations KBOX and KTXO, at substantial distances from the transmitter

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4/ There are no "white" or "gray" areas. The interfered-with Class IV stations are encouraged by Commission policy to improve their services by applying, like the applicant herein, for authority to increase power up to one kilowatt. The licensees of the three Class IV stations have not been named as parties herein. However, they have not objected to grant of the KPLT application or sought to intervene herein.

5/ See also Report and Order released June 2, 1958 (17 RR 1541) and 47 CFR 3.21(c), 3.41 (Table), and 3.182(a)(4); Report and Order released December 19, 1960 (20 RR 1661) and 47 CFR 3.28(c)(3); Report and Order released May 4, 1961 (21 RR 1600) and 47 CFR 1.354(c); Report and Order released May 10, 1962 (23 RR 1545). And see the Commission's Memorandum Opinion and Order, par. 3, released June 14, 1962 In re New Iberia

Broadcasting Co. (KANE), 23 RR 825; and the initial decision of Hearing Examiner Walther W. Guenther, released May 1, 1963 In re Albert Lea Broadcasting Company (KATE), Docket No. 14686 (FCC 63D-52), which became effective without Commission action on June 30, 1963 by operation of 47 CFR 1.153 (34 FCC 1234).

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sites of these stations and roughly at equivalent distances from the KPLT transmitter site. 6/ Furthermore, while the licensees of Stations KBOX and KTXO object to grant of KPLT's application and have participated in the hearing neither may properly contend on the basis of the record in this proceeding, which they have been afforded every opportunity to help develop, that the listening public in the interference areas concerned will be deprived of needful services from their stations if KPLT's application is granted. Indeed, as indicated, in terms of numbers of listenable signals available to that public loss of the KBOX and KTXO signals will be compensated by gain from KPLT. Accordingly, in the light of the allocation policy consistently enunciated in Commission decisions to encourage increases in power by Class IV stations on a nationwide basis, while yet giving allowance to such factors as the extent of the new interference, substitution of service, and availability of other services in the interference areas, it would be sheerest sophism for the Hearing Examiner to conclude other than that the "need" of the population which will gain new primary service by a grant of KPLT's application has been demonstrated to outweigh the public "need" for service which will be lost to Stations KBOX and KTXO. WSTV, Inc., supra, 31 FCC at pages 708, 709. Note is taken, of course, of the co-channel interference that will result to other Class IV stations, all of which are still operating with 250 watts of power, as shown upon the present record. In each such instance no significant lack of service to these particular interference areas has been evinced — in fact it has been satisfactorily demonstrated that there will be no "white" or "gray" areas created. 7/ And these stations, of course, are likewise encouraged to compensate for the loss of their service by applying for authority to increase their own daytime power. 8/

6/ It is not unreasonable to deduce, absent evidence to the contrary as in the present case, that listeners in rural areas substantial distances from the locations of the interfered-with stations are no more dependent on these particular stations for the services they render than they will be upon applicant's station.

7/ See WSTV, Inc., 31 FCC 694, cited supra, par. 13, and footnote 5.

8/ It is considered to be immaterial that conceivably there might be "other" impediments to the grant of applications for power increases by the Class IV stations affected by the KPLT proposal and that it is not known when or if these stations may apply. The present case may be determined only on the basis of the present record read in the light of established Commission policy. In making this argument respondent KBOX merely speculates without citation of precedent or presentation of supporting data.

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15. It is appropriate to observe when, as in the present instance, it is generally known that the only crucial question involved is an apparent collision between a policy of the Commission which looks favorably upon a broad-scale, nationwide, improvement of facilities by Class IV stations and the policy of rule 3.24(b) which requires applicants in specific cases, whose proposals would cause objectionable interference to existing stations, to show counterbalancing "need", that objecting respondents have an obligation to do more than to assume a purely passive pose thereby inevitably delaying the full implementation of the important national policy objective. 9/ Indeed, theirs is a responsibility by the production of countervailing (rebuttal) evidence or other data, or by persuasive argument, to show cogently that the nationwide policy should be made to bow to the more specific policy prescribed in rule 3.24(b) in terms of positive public benefits to be gained or lost. In the present case the record clearly supports a conclusion that the licensee of Station KPLT is only seeking, albeit belatedly, to implement the national policy for Class IV stations which the Commission has declared to be generally beneficial and advantageous to the public interest. Consequently,

it must be concluded ultimately that the public interest, convenience and necessity will be served by granting KPLT's application.

ORDER

IT IS ORDERED, This 25th day of July 1963, that unless an appeal to the Commission from this initial decision is taken by any of the parties, or the Commission reviews the initial decision on its own motion under 47 CFR 1.153, the application of KPLT, Inc. (KPLT), for authority to increase the daytime power of Station KPLT, Paris, Texas from 250 watts to one kilowatt on the frequency 1490 kc, is hereby GRANTED, subject to the conditions:

9/ See Memorandum Opinion and Order of the Commission In re New Iberia Broadcasting Co. (KANE), 23 RR 825, 826, wherein the Commission declared flatly, that "when a Class IV station is not precluded from increasing power by international considerations, the Commission has regarded the goal of general implementation [to encourage Class IV stations to increase power] as a policy consideration overriding other considerations [in that instance violation of rule 3.35] which would ordinarily be of decisional significance" (emphasis in quote added). Cf. Hudson Valley Broadcasting Corporation v F.C.C., Court of Appeals for the D. C. Circuit, decided June 6, 1963, Case No. 17, 310, 25 RR 2074, wherein the Court required an adversary hearing as a predicate for resolving colliding policy considerations. In the present case, of course, the respondents have been afforded the necessary hearing but they have had nothing of substance to offer.

(a) That permittee shall accept such interference as may be imposed by other existing 250 watt Class IV stations in the event they are subsequently authorized to increase power to 1000 watts; and

(b) That permittee shall submit with the application for license antenna resistance measurements made in accordance with Section 3.54 of the Commission's Rules.

/s/ David I. Kraushaar

David I. Kraushaar
Hearing Examiner
Federal Communications Commission

Released: July 25, 1963
and effective 50 days thereafter, subject to the provisions of the Rule (1.153) cited in the ordering clause above. Exceptions, if any, must be filed within 30 days of the release date unless an extension is duly granted.

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[Released: F.C.C., January 10, 1964]

DECISION

By the Review Board: Nelson, Pincock and Slone.

1. This proceeding involves an application by KPLT, Inc., licensee of Station KPLT, Paris, Texas (1490 kc, 250 w, U, Class IV) for authorization to increase power daytime to 1 kilowatt. By Memorandum Opinion and Order (FCC 63-336) released April 15, 1963, the Commission designated the application for hearing on the following issues:

1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station KPLT and the availability of other primary service to such areas and populations.
2. To determine whether the proposal of KPLT, Inc. would cause objectionable interference to Stations KBOX and KTXO, Dallas and Sherman, Texas, respectively, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.
3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

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2. Hearing Examiner David I. Kraushaar, in an Initial Decision (FCC 63D-87), released July 25, 1963, recommended a grant of the application. Exceptions were filed by Radio Station KBOX, licensee of Station KBOX, Dallas, Texas, a respondent in this proceeding; by O'Connor Broadcasting Corporation, licensee of Station KTXO, Sherman, Texas, another respondent; and by Chief, Broadcast Bureau. Oral argument was

held before a panel of the Review Board on November 26, 1963. We have considered the Initial Decision in the light of the record herein, the exceptions filed, and the oral argument presented. The essential facts are not in dispute and, with the necessary modifications and amplifications, based upon the record and noted in this Decision, the Examiner's findings of fact are adopted. The Board agrees with the Examiner's conclusion that the application should be granted, subject to the modifications noted in this Decision and in our rulings on exceptions contained in the Appendix attached hereto.

3. The pertinent facts are as follows: KPLT presently serves 69,037 persons residing in an area of 3,191 square miles. The proposed increase in power would bring a new daytime service to 27,115 additional persons in an area of 1,728 square miles, thereby raising applicant's total daytime coverage to 96,152 persons in an area of 4,919 square miles. This represents a percentage increase in population of over 39%. The gain area is located from 20 to 49 miles from the KPLT transmitter site. No persons now served by KPLT would lose its service. The KPLT proposal would provide a fifth primary service (2.0 mv/m or greater signal) to the city of Hugo, Oklahoma (1960 population, 6,287). A minimum of four services are available to all portions of the rural areas gaining service from the proposed operation.

4. Interference would be received from the proposed operation by one Class II station, one Class III station, and three Class IV stations. Adjacent channel interference would be received from KPLT's proposed operation by Class II Station KTXO, Sherman, Texas (1500 kc, 250 watts, D), in an area between 25 and 49 miles from the KTXO site and between 28 and 48 miles from the KPLT site. In a portion of this area of interference, the service proposed by KPLT will be substituted for that of KTXO.[1/] The interference which KTXO receives from KPLT's existing operation amounts to 12,002 persons within an area of 645 square miles, or 7.9% of the total population and 11% of the total area within KTXO's 0.5 mv/m contour. The new interference would affect 8,407 persons in

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an area of

1/ The Examiner found that all of such loss areas would receive substitute service from the KPLT proposal, but the evidence indicates that KPLT would receive co-channel interference from Class IV Stations KVWC and KGKB in portions of such areas.

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458 square miles representing 5.1% and 8.1% of the population and area, respectively, within KTXO's 0.5 mv/m contour. Thus, with this additional interference, KTXO would receive a total loss of 20,996 persons residing in an area of 1,120 square miles, representing 13.3% of the total population and 19.4% of the total area within KTXO's 0.5 mv/m contour.2/ At least eleven other stations provide primary service (0.5 mv/m or greater) to the entire additional interference area.

5. Adjacent channel interference would also be received from the proposed operation by Class III Station KBOX, Dallas, Texas (1480 kc, 500 w, 5 kw-LS, DA-2, U), in an area between 43 and 64 miles from the KPLT site and between 30 and 49 miles from the KBOX site, or about 5 miles closer to KBOX than the interference area resulting from the present KPLT operation. In a portion of the area of interference, the service proposed by KPLT will be substituted for that of KBOX. (See footnote 1.) This additional interference would affect 8,188 persons in an area of 491 square miles3/ and represents 0.49% of the population and 3.6% of the area within KBOX's 0.5 mv/m contour. This new interference would result in a total loss of 10,109 persons residing in an area of 642 square miles representing 0.6% of the total population and 4.6% of the total area within KBOX's 0.5 mv/m contour.4/ Sixteen additional stations presently provide service (0.5 mv/m or greater) to the entire additional area of objectionable interference to Station KBOX.

6. The three Class IV stations (1490 kc, 250 w, U) which would be affected by KPLT's proposed increase in power are Station KVWC, Vernon, Texas; Station KGKB, Tyler, Texas; and Station KBIX, Muskogee,

Oklahoma. Station KVWC would receive co-channel interference from the KPLT proposal affecting an area of 311 square miles and 4,208 persons representing 3.7% of the total area and 5.7% of the total population within its 0.5 mv/m contour. Five other stations provide service of 0.5 mv/m or better to all of this area. Station KGKB presently receives co-channel interference from KPLT affecting 5,179 persons in an area of 286.5 square miles representing 5.05% of the total population, and 17% of the total area within its 0.5% mv/m contour. Additional co-channel interference from the KPLT proposal would be received by Station KGKB affecting 15,958 persons within an area of 492.5 square miles, raising

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2/ These totals include interference received from KBOX in an area of 17 square miles containing 557 persons.

3/ The Examiner found that 8,368 persons and 501 square miles would be affected. However, his figures erroneously included 180 persons and 10 square miles already receiving interference from KTXO.

4/ These total include interference received from KTXO in an area of 22 square miles containing 469 persons.

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interference to KGKB to a total of 20.6% of the population and a total of 46% of the area within its 0.5 mv/m contour. Six other stations provide service of 0.5 mv/m or better to all of this area. Station KBIX presently receives co-channel interference from KPLT affecting 235 persons in an area of 10 square miles representing 0.24% of the total population and 0.38% of the total area within its 0.5 mv/m contour. Co-channel interference from the KPLT proposal would also be received by Station KBIX affecting 6,787 persons in an area of 430 square miles, raising KBIX's total interference to 7.3% of the population and 17.1% of the area within its 0.5 mv/m contour. Five other stations provide service of 0.5 mv/m or better to this entire area.

7. By agreement among the parties herein, the instant case was

presented entirely in written form. All parties accepted Exhibit 1 of KPLT, Inc., as a complete and accurate presentation of the facts. 5/ Since this case involves the proposed increase in daytime power to 1 kw of a Class IV station, the Commission's policy favoring such power increases by Class IV stations is brought into play. This policy is set forth in the following reports: Power Limitations of Class IV Stations, FCC 58-513, 17 RR 1541 (1958); Report and Order, FCC 60-1516, 20 RR 1661 (1960); and Report and Order, FCC 61-601, 21 RR 1600 (1961). The construction and impact of these reports have been discussed in many decisions, the most recent of which is Radio Ashland, Inc. (WNCO), 35 FCC 645 (1963).

8. The questions raised with respect to the additional interference which would be received by existing stations from KPLT's proposal fall into two categories: (a) the interference to be received by existing Class IV stations (the intended beneficiaries of the Commission's general objective in granting power increases for Class IV stations) totalling 26,953 persons; and (b) the interference to be received by respondents' Class II and Class III stations affecting 16,595 persons. These categories must be considered vis-a-vis the 27,115 persons who would gain service from KPLT's proposal. While the provisions of Section 3.24(b) of the Rules, which require that a "satisfactory showing" be made that "the need for the proposed service outweighs the need for the service which will be lost by reason of such interference" must be applied to all interference to be caused by a proposal, there is reason and authority for the proposition that interference to Class IV stations in these circumstances may be considered with less individual concern. Iowa Great Lakes Broadcasting Co. (KICD), 31 FCC 905, 22 RR 645 (1961); WSTV, Inc., 31 FCC 694, 21 RR 575 (1961). The Class IV stations involved in the instant proceeding have not objected to a grant, nor have they attempted to intervene herein. Moreover, the impact of a grant of such Class IV stations is substantially diminished by the first condition attached to

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5/ Except to the extent that corrective exceptions were filed.

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the grant herein. Finally, the Board must recognize that denial of a requested Class IV power increase on the ground that interference would be caused to 250 watt Class IV stations might frustrate the Commission's efforts to effectuate a nationwide chain of Class IV stations of 1 kw power.

9. Our major concern, therefore, is with the additional adjacent channel interference which would be received by respondents' Class II and Class III stations. In this connection, the Commission in its Report and Order (FCC 61-601, 21 RR 1600) amending its procedures for processing Class IV station applications seeking power increases observed:

> " . . . it is hopeful that demands for hearing may be eased by the expectation, that in all but those cases involving substantial interference, the interference to adjacent channel stations will not override the benefits which can be expected from nationwide Class IV increases in power. Although as indicated, supra, adjudication after hearing must necessarily be based upon the record made in the proceeding, the improvement of service to be derived from a nationwide chain of local station power increases, will retain a position of superior decisional significance." (Emphasis added)

Thus, even insofar as respondents' stations are concerned, in making the determination required by Section 3.24(b) of the Rules a preference may be given to the implementation of the broad policy objective of the Commission to encourage and permit higher power for Class IV stations. When we add to this preference the other factors reflected in the record of this proceeding, we must conclude that, together, they call for a grant of KPLT's application. These additional factors include the facts that no persons now served by KPLT would lose its service; that a new daytime service would be provided to 27,115 additional persons in an area of 1,728 square miles; that there would be a net gain over losses to respondents' stations of 10,520 persons within 779 square miles; that the interference areas range from 25 to 49 miles from the sites of respondents' stations;

that in portions of said interference areas, the service proposed by KPLT would be substituted for that of the respondents; and that all of the interference areas received primary service (0.5 mv/m or greater) from at least 11 to 16 other stations. In our view, the above factors clearly call for the conclusion that the need for the proposed service outweighs the nee for the service which will be lost.

10. Even if the interference to Class IV stations were to be considered with that of other classes in this instance, the fact that a net curtailment of coverage would result is not, in and of itself, a disqualifying consideration. See WSTV, Inc., supra, where an application

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by a Class IV station to increase power to 1 kw was granted despite a net loss in service. Here, as in WSTV, Inc. no white or gray areas would result from a grant. Accordingly, these considerations, added to those enumerated above, lead to the conslusion that the need for the KPLT proposed service has been satisfactorily shown to outweigh the need for the service which will be lost by reason of all of the interference which would be received from the KPLT proposal. This conclusion is based on the showing which the applicant presented, considered in the light of the Commission's policy favoring power increases by Class IV stations. See Radio Ashland, Inc., supra.

11. Respondent KBOX suggests the Commission's New Iberia case was overruled by Hudson Valley Broadcasting Corporation v. FCC, 320 F. 2d 723, 25 RR 2074 (1963). In New Iberia Braodcasting Co., FCC 62-628, 23 RR 825 (1962) the Commission stated:

> "Accordingly when a Class IV station is not precluded from increasing power by international considerations, the Commission has regarded the goal of general implementation as a policy consideration over-riding other considerations which would orinarily be of decisional significance."

We cannot agree that the Hudson Valley case so holds. While that case also involved a consideration of the Commission's policy favoring Class IV power increases, the Court of Appeals merely held that, where there are presented to the Commission materail issues of fact, Section 309(b)(2) of the Communications Act requires that a hearing be held. Here a hearing was held. As the Commission indicated in Iowa Great Lakes Broadcasting Co. (KICD), 32 FCC 907, 22 RR 652a (1962), a Class IV licensee seeking to increase power to 1 kw is entitled to presume that the above policy considerations are applicable to his proposal.

12. In their exceptions, the respondents point out that the Examiner, in paragraph 15 of the Initial Decision, stated that respondents have the responsibility "to show cogently that the nationwide policy [regarding Class IV power increases] should be made to bow to the more specific policy prescribed in Rule 3.24(b) in terms of positive benefits to be gained or lost." At oral argument, KBOX and KTXO cited the Hudson Valley case, supra, as holding that a policy of the Commission cannot override a hearing record or a rule of the Commission. This is true, and the Examiner's language, insofar as it lends itself jutifiably to a contrary interpretation, requires modification. The policy does not override a hearing record or a rule; the policy has been considered in applying the rule to the hearing record.

13. KTXO argues also that the burden of proof under Section 3.24 was on the applicant; that KTXO agreed with the "only evidence (engineering data) introduced by KPLT"; that there was no need for KTXO

to rebut that evidence; and that KPLT would enlarge its service area at a cost of destroying existing service. In substance, KBOX joins in this contention. As we have indicated above, KPLT has established a prima facie case for a grant. Under such circumstances, it was incumbent on respondents to come forward with evidence offsetting the applicant's

showing. They did not do so. Presumably, respondents' respective programming services meet no special needs of the populations in the interference areas for they did not seek enlargement of the issues to permit such showings. Regional Radio Service, 32 FCC 1073, 23 RR 599 (1962).

14. For the reasons cited above, it is concluded that the need for the proposed service outweighs the need for the service lost and that a grant of the subject application, with the conditions specified below, would serve the public interest, convenience and necessity.

ACCORDINGLY, IT IS ORDERED, This 7th day of January, 1964, That the application (BP-15371) of KPLT, Inc., for an increase in power at Paris, Texas IS GRANTED, subject to the following conditions:

> Permittee shall accept such interference as may be imposed by other existing 250 watt Class IV stations in the event they are subsequently authorized to increase power to 1000 watts.
>
> Permittee shall submit with the application for license antenna resistance measurements in accordance with Section 73.54 of the Commission's Rules.

Joseph N. Nelson
Member, Review Board
Federal Communications Commission

Released: January 10, 1964

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Rulings on Exceptions of O'Connor Broadcasting Corporation

Exception No.	Ruling
1	Granted. See paragraph 3 of this Decision.
2	Granted. See paragraph 4 of this Decision.
3	Denied. See paragraph 13 of this Decision.
4	Denied to the extent that said conclusion implies that

respondents' programming services meet no special needs of the populations in the interference areas. See paragraph 13 of this Decision. Granted to the extent that there is an implication that respondents are not serving the needs of their audiences.

5 Denied. For the reasons set forth in this Decision.

6 Granted to the extent indicated in paragraph 12 of this Decision. While the Board has modified the subject conclusion it does not, by grant of this exception, agree that the Hudson Valley case overruled the New Iberia case. See paragraph 11 of this Decision.

7 Denied. For the reasons set forth in this Decision.

8 Denied as procedurally defective and for containing conclusions inconsistent with those arrived at in this Decision. It fails as an "exception" because it does not comply with the provisions of Section 1.277 of the Rules and contains, improperly, argumentative matter and discussions of law. Veterans Broadcasting Co., Inc., 29 FCC 1105, 20 RR 1029 (1960). Rather, the proposed decisional language, consisting of 11 single-spaced paragraphs, constitutes, in form and substance, proposed findings and conslusions. As such, they have been presented to the wrong forum.

Rulings on Exceptions of Radio Station KBOX

1 Denied. The requested finding cannot be made because the facts claimed to be absent were not in issue and because the intentions of the specified stations are not pertinent to a decision in this case.

Exception No. Ruling

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2	Granted. See footnote 1, of this Decision, and paragraphs 4 and 5.
3	Granted. See paragraph 6, of this Decision.
4	Denied. See paragraph 13 of this Decision.
5	Denied. For the reasons set forth in this Decision.
6	Granted. See the ruling on Exception 6 of O'Connor Broadcasting Corporation.
7	Denied. For the reasons set forth in this Decision.
8	Denied. For the reasons set forth in this Decision.

Rulings on Exceptions of Chief, Broadcast Bureau

1, 2	Granted. See footnote 1 of this Decision, and paragraphs 4 and 5.

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B
FCC 64R-265
51367

MEMORANDUM OPINION AND ORDER

By the Review Board: Board Member Berkemeyer not participating.

1. On January 10, 1964, the Review Board released a Decision granting the application of KPLT, Inc. (KPLT) for a construction permit to increase the daytime power of its Class IV station at Paris, Texas from 250 watts to 1 kilowatt, (36 FCC 115, 1 RR 2d 774). O'Connor Broadcasting Corporation, licensee of Station KTXO, Sherman, Texas has filed a petition for rehearing[1/], "pursuant to Section 405 of the Communications Act of 1934, as amended, "requesting the Commission "to reconsider and set aside" the Decision and "(a) issue a revised decision denying said application, (b) reopen the record to obtain evidence to determine if the three existing co-channel Class IV stations which will receive additional interference from the proposed operation may obtain increases in power to 1 kilowatt so as to offset or neutralize such losses, (c) grant O'Connor Broadcasting Corporation authorization to file an application to increase the power of Station KTXO to 1 kilowatt so as to neutralize or restore

loss of service which will result from the operation of Station KPLT with increased power, (b) modify the first condition attached to the grant of the above-entitled application to include operation by Station KTXO with power of 1 kilowatt, or (e) accord such other relief as may be appropriate."

2. In its Motion to Dismiss Petition for Rehearing, KPLT asserts that the petition for rehearing addressed to the Review Board "pursuant to Section 405 of the Communications Act" is improper and should be summarily dismissed because (a) Section 5(d) of the Communications Act provides the only authority for review of the Review

1/ The Review Board has before it a Peition for Rehearing, filed February 10, 1964, by O'Connor Broadcasting Corporation (KTXO); Broadcast Bureau's Opposition to Petition, filed February 20, 1964; Opposition, filed February 24, 1964, by KPLT; and Reply, filed March 9, 1964 by petitioner. The Board also has before it a Motion to Dismiss Petition for Rehearing, filed February 24, 1964 by KPLT; and Opposition thereto, filed March 9, 1964, by O'Connor Broadcasting Corporation (KTXO).

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Board's actions; (b) Sections 1.104 and 1.106 of the Rules implement Section 5(d) (2) [sic] of the Act; (c) these two sections of the Rules provide the only two methods for review of an action by the Review Board; and (d) a petition for rehearing may not be considered as a petition for reconsideration. In addition, KPLT asserts that the petition for rehearing should be dismissed because Section 1.44 of the Rules requires the filing of separate pleadings addressed to separate bodies within the Commission and a portion of the relief requested by KTXO can only be considered by the Commission itself.

3. Section 1.106 of the Rules, relating to petitions for reconsideration, does not preclude petitions to the Review Board under Section 405 of the Communications Act. Section 1.106 was in fact promulgated pursuant to Section 405 of the Act (28 Fed. Reg. 12423; 27 Fed. Reg. 5660). Furthermore, Section 405 specifically refers to rehearing "after an order, decision, report, or action has been made or taken by the Commission, or by any designated authority within the Commission pursuant to a delegation under Section 5(d) (1). . . ." (Emphasis added). With regard to the

use by petitioner of the term "reconsideration" in connection with its petition for rehearing, past precedents indicate that such terms are used interchangeably. See, e.g., Valley Broadcasting Co. (KWOW), 13 RR 208a, 208d (1955). For the foregoing reasons, we consider the subject petition for rehearing to be properly filed and the motion to dismiss the petition will be denied.

4. KTXO states that it "has no objection to its alternative request for relief of permitting KTXO to file an application for an increase in power being dismissed by the Review Board on jurisdictional grounds." While Section 1.44 of the Rules gives the Review Board discretion to return without consideration a petition addressed to it containing a request which can only be acted upon by the Commission, the Board has the authority, which it will exercise, to dismiss item (c) of the requests contained in the subject petition since it has no jurisdiction over that request. As to the remaining requests properly addressed to the Review Board, we will consider the contentions of the parties with respect thereto in order to dispose of them on the merits.

5. In support of its request for rehearing, KTXO asserts that (a) the decision ignored interference to Class IV stations and thus failed to consider the fact that the total population losing service in the combined interference areas exceeds the population gaining a new service; (b) the Class IV power increase policy cannot be applied ". . . unless it is shown that the station which would be adversely affected by the application of the policy may also increase its power to maintain the same signal strength ratio"; and (c) the Board erred in indicating that the burden of proof was upon respondents to come forward with evidence demonstrating that their programming met the

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special needs of the populations in the interference areas. KTXO further argues that the principal cases cited by the Review Board in its decision [2/] are not in point. Oppositions filed by KPLT and the Broadcast Bureau state that the Review Board properly weighed the total net loss of service

which would result from a grant of the KPLT application against the gain in service which would result therefrom, and that the Review Board's decision is in keeping with existing Commission decisions cited in the Final Decision.

6. Each of the contentions raised by KTXO was advanced prior to the Final Decision, either in exceptions or in oral argument, and each has been answered in the Final Decision. However, KTXO's petition merits some additional observations. KTXO asserts that "the Review Board for all practical purposes ignored the fact that the three existing Class IV stations will suffer interference totalling 26,953 persons in areas of 1,233.5 square miles." This assertion is in direct conflict with the Board's explicit finding in its Decision at paragraph 8. The Board did consider the interference to Class IV stations and the net loss in service; however, paramount considerations induced us to conclude that the need for the proposed service outweighs the need for the service lost. Petitioner asserts that the Commission's policy favoring power increases by Class IV stations [3/] should not have been applied in this case since there is no proof of record that the Class IV stations which will suffer interference from KPLT's proposal would be able to increase their own power, thereby effectuating the purposes of the policy. This argument was answered in the Decision at paragraph 11, wherein the Board states: "As the Commission indicated in Iowa Great Lakes Broadcasting Co. (KICD), 32 FCC 907, 22 RR 652a (1962), a Class IV licensee seeking to increase power to 1 kw is entitled to presume that the above policy considerations are applicable to his proposal." In this connection, it is also noted that one of the Class IV stations under consideration herein, Station KBIX, Muskogee, Oklahoma filed an application for a power increase to 1 kw on January 23, 1963 (BP-15844). Petitioner asserts that the three cases relied on by the Review Board in its Decision, Radio Ashland, Inc., supra; WSTV, Inc., supra; and

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[2/] Radio Ashland, Inc. (WNCO), 35 FCC 645 (1963); WSTV, Inc., 31 FCC 694, 21 RR 575 (1961); and Iowa Great Lakes Broadcasting Co. (KICD), 31 FCC 905, 22 RR 645 (1961).

[3/] See Power Limitations of Class IV Stations, FCC 58-513, 17 RR 1541 (1958); Report and Order, FCC 60-1516, 20 RR 1661 (1960); and Report and Order, FCC 61-601, 21 RR 1600 (1961).

Iowa Great Lakes Broadcasting Co., supra, can all be distinguished.[4/] These cases are said to have involved either the recoupment of lost service areas by the seeking of increases in power by Class IV stations with interlocking co-channel interference problems. Obviously, the intent of the above policy is that Class IV stations should be permitted to increase power under circumstances other than those alleged to be involved in the cited cases. Were this not the case the Commission's intent that its policy be effectuated on a nationwide scale could well be frustrated. Moreover, it is noted that in each of the three cases in question interference would be caused by the Class IV applicants for power increases to other Class IV stations which had not previously applied for power increases and which were not simultaneously applying for power increases; in each of those cases the usual Class IV power increase condition was appended to the grant.[5/]

7. In the alternative, KTXO requests that the Review Board append another condition to its grant of the KPLT application by which KPLT shall accept such interference as may result from an increase in power to 1 kilowatt by KTXO. Section 1.592 of the Rules dealing with conditional grants applies, by its terms, only with regard to applications which are mutually exclusive. Since an application for an increase in power has not been timely filed by KTXO, the instant application of KPLT cannot be considered to be mutually exclusive therewith. The condition quoted in footnote 5 involving future applications for increases in power by Class IV stations has been attached to grants as part of the implementation of the Commission's policy favoring Class IV power increases on a nationwide basis. Petitioner KTXO has made no

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[4/] KTXO also contends that Hudson Valley Broadcasting Corporation v. FCC, 320 F. 2d 723, 25 RR 2074 (1963), holds "that the Commission may not subordinate its rules and well established other policies to its new policy of permitting Class IV stations to horizontally increase power." KTXO apparently overlooked the Board's statement in paragraph 12 of the Decision:

> "At oral argument, KBOX and KTXO cited the Hudson Valley case, supra, as holding that a policy of the Commission cannot override a hearing record or a rule of the Commission.

> This is true, and the Examiner's language, insofar as it lends itself justifiably to a contrary interpretation, requires modification. The policy does not override a hearing record or a rule; the policy has been considered in applying the rule to the hearing record."

5/ "Permittee shall accept such interference as may be imposed by other existing 250 watt Class IV stations in the event they are subsequently authorized to increase power to 1000 watts."

showing that the condition which it requests would tend to implement the aforesaid Commission policy, or in any other way advance the public interest.

8. Finally, KTXO asserts that the applicant failed to sustain its burden under Rule 73.24 by the introduction of programming evidence or by otherwise showing a superior need for its proposed service. In this connection, petitioner's attention is directed to the statement from the Commission's Report and Order (FCC 61-601, 21 RR 1600) quoted at paragraph 9 of the Board's Decision:

> ". . . it is hopeful that demands for hearing may be eased by the expectation, that in all but those cases involving substantial interference, the interference to adjacent channel stations will not override the benefits which can be expected from nationwide Class IV increases in power. Although as indicated, supra, adjudication after hearing must necessarily be based upon the record made in the proceeding, the improvement of service to be derived from a nationwide chain of local station power increases will retain a position of superior decisional significance."

Thus, in comparing needs under Rule 73.24, the benefits which can be expected from nationwide Class IV increases in power will retain superior decisional significance unless it can be shown that the need for the service which will be lost in the event of grant overrides such considerations. Where, as here, there is no showing of special need for respondents'

service which will be lost, and enlargement of issues was not sought to make such showing, special needs for such lost service cannot be presumed. Regional Radio Service, 32 FCC 1073, 23 RR 599 (1962); WSTV, Inc., supra.

9. From the foregoing, it is apparent that KTXO has raised no new facts which would warrant the Review Board reconsidering or rehearing its Decision in this case.

ACCORDINGLY, IT IS ORDERED, This 8th day of May, 1964, That the Petition for Rehearing, filed February 10, 1964, by O'Connor Broadcasting Corporation (KTXO) IS DENIED except as to the request for authorization by Station KTXO to file an application for increase in power, which request IS DISMISSED; and that the Motion to Dismiss Petition for Rehearing, filed February 24, 1964, by KPLT, Inc. (KPLT), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple

Ben F. Waple
Secretary

[SEAL]

Released: May 11, 1964

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B
FCC 64-815
54836

O R D E R

By the Commission:

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 2nd day of September, 1964;

The Commission having under consideration an application for review of the Review Board's Decision and Memorandum Opinion and Order herein, filed June 10, 1964, by O'Connor Broadcasting Corporation (KTXO); oppositions thereto filed by KPLT, Inc. (KPLT) on June 22,1964, and by the Chief, Broadcast Bureau on June 25, 1964; and a reply to the above oppositions filed by O'Connor on July 6, 1964;

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IT IS ORDERED, That the above-referenced application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple

Ben F. Waple
Secretary

[SEAL]

Released: September 8, 1964

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,944

O'CONNOR BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

KPLT, INC.,

Intervenor

Appeal from a Decision and Order of the
Federal Communications Commission

ROBERT M. BOOTH, JR.
1100 Vermont Avenue, N.W.
~~1735 DeSales Street, N. W.~~
Washington, D. C. ~~20036~~ 20005

Counsel for Appellant
O'Connor Broadcasting Corporation

January 21, 1965

QUESTIONS PRESENTED

1. Whether the Commission's conclusion that the need for the proposed service of Station KPLT outweighs the need for the service of existing stations, including Station KTXO, which will be lost by reason of interference from the proposed operation is supported by the evidence.

2. Whether the Commission's reliance upon its policy to encourage Class IV stations to increase daytime power on a nationwide basis was erroneous.

3. Whether the Commission's conclusion that the applicant had made a prima facie case for the grant of its application and that the burden was upon the Appellant to come forward with offsetting evidence was erroneous.

4. Whether the Commission's reference to and reliance upon a pending but ungranted application for an increase in the daytime power of Station KBIX was erroneous.

5. Whether the grant of the application to increase the daytime power of Station KPLT satisfies the fair, efficient and equitable distribution of radio service provision of Section 307(b) and the public interest, convenience and necessity provision of Section 309 of the Communications Act of 1934, as amended.

6. Whether the Commission's refusal to attach appropriate conditions or waivers to the grant of the application to increase the daytime power of Station KPLT which would permit Appellant to file an application to neutralize or offset the loss of service by its Station KTXO was erroneous.

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TABLE OF AUTHORITIES

Statutes and Rules:

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,944

O'CONNOR BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

KPLT, INC.,

Intervenor.

Appeal from a Decision and Order of the
Federal Communications Commission

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is taken pursuant to Sections 402(b)(5) and (6) of the Communications Act of 1934, as amended, 47 USC §402(b)(5) and (6), and Rule 37 of this Court. Appellant, as the licensee of standard

broadcast atation KTXO, Sherman, Texas, has had its license modified by the issuance by the Appellee of a final decision granting an application of KPLT, Inc., for a construction permit to increase the daytime power of standard broadcast station KPLT, Paris, Texas (R. 212-220),[1] and by the subsequent orders denying a petition for rehearing (R. 255-259) and an application for review (R. 290). Because of the modification of its license, Appellant is a person aggrieved and whose interests have been adversely affected.

STATEMENT OF THE CASE

Stations KTXO and KPLT have been operating side-by-side on first adjacent channels (10 kilocycles (kc) apart) at Sherman and Paris, Texas, respectively, since KTXO was established in 1947. Appellant's station KTXO, is licensed by the Federal Communications Commission to operate as a Class II daytime only station on the frequency of 1500 kc with a power of 250 watts.[2,3] Intervenor's station KPLT is licensed by the Commission to operate as a Class IV unlimited time station on the frequency of 1490 kc with a power of 250 watts.[4] Until 1958, the maximum permissible power of Class IV stations, such as KPLT, was 250 watts. That year, after a rule making proceeding, the Commission amended its rules to permit 250 watt Class IV stations to seek increases in daytime power to either 500 watts or 1 kilowatt (kw). *Report and Order*, 17 Pike & Fischer Radio Regulation 1541.

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[1] Citations given as "R. __" are to the record filed with the Court.

[2] All stations discussed in this brief are standard (AM) broadcast stations.

[3] Section 73.21(a)(2) of the Commission's Rules, 47 CFR §73.21(a)(2), defines a Class II station as "a secondary station which operates on a clear channel (see §73.25) and is designed to render service over a primary service area which is limited by and subject to such interference as may be received from Class I stations."

[4] Section 73.21(c)(1) of the Commission's Rules, 47 CFR §73.21(c)(1), defines a Class IV station as "a station operating on a local channel and designed to render service primarily to a city or town and the suburban and rural areas contiguous thereto."

On February 12, 1962, intervenor filed with the Commission an application for a construction permit to increase the daytime power of KPLT to 1 kw (R. 1-39).

On May 4, 1962, Appellant filed with the Commission an engineering study showing that the proposed operation of KPLT would cause objectionable interference to and loss of service by KTXO, and requested that the application not be granted[5] (R. 44-47).

Because the ratio of desired to undesired signals of stations separated by 10 kc is 1 to 1, no substantial area now receiving service from the 250 watt operations of KTXO and KPLT would lose service if both stations simultaneously increased power by an equal amount. However, before Appellant was able to complete preparation of an application to increase the power of KTXO to 1 kw, the Commission, on May 10, 1962, without prior announcement, imposed a freeze upon acceptance of most standard broadcast applications. *Report and Order,* 23 RR 1545. As a result, Appellant was foreclosed from filing an application to increase the power of KTXO to 1 kw which could be considered concurrently with KPLT's application.

As the result of Appellant's concern over the loss of service by KTXO, and a similar concern by the licensee of Station KBOX, a Class III station operating on the other first adjacent channel at Dallas, Texas,[6] (R. 48-54), the Commission designated KPLT's application for hearing by an order released April 15, 1963, upon the following issues which contemplated and required the introduction only of engineering (technical)

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[5] The engineering study showed that the proposed 0.5 millivolts per meter (mv/m) contour of KPLT would overlap the existing 0.5 mv/m contour of KTXO. Because the ratio of desired to undesired signals of stations operating 10 kc apart is 1 to 1, objectionable interference to both stations will occur when the normally protected daytime 0.5 mv/m contours overlap.

[6] Section 73.21(b)(1) of the Commission's Rules, 47 CFR §73.21(b)(1), defines a Class III station as "a station which operates on a regional channel and is designed to render service primarily to a principal center of population and the rural area contiguous thereto."

evidence[7] (R. 62-63). Because the order of designation made no mention of the burden of proceeding with the burden of introduction of the evidence and the burden of proof, both burdens were upon the applicant, KPLT.[8] The licensees of KTXO and KBOX were named respondents.

The evidence introduced by KPLT, as accurately summarized in paragraphs 3 to 6, inclusive, of the final decision (R. 213-216), establishes that the proposed increase in power by KPLT would cause objectionable interference to and loss of service by five existing stations, adjacent channel stations KTXO and KBOX, and 250 watt Class IV co-channel stations KVWC, Vernon, Texas, KGKB, Tyler, Texas, and KBIX, Muskogee, Oklahoma. Although 27,115 persons in an area of 1,782 square miles would gain service from KPLT (R. 213), a total of 43,548 persons in areas totalling 2,182.5 square miles would lose service of the five existing stations. The individual losses would be as follows: by KTXO,

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[7] The following issues were specified in the hearing order:

> "1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station KPLT and the availability of other primary service to such areas and populations.
>
> "2. To determine whether the proposal of KPLT, Inc., would cause objectionable interference to Stations KBOX and KTXO, Dallas and Sherman, Texas, respectively, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.
>
> "3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity." (R. 62-63).

[8] Section 1.254 of the Commission's Rules, 47 CFR §1.254 (formerly Section 1.140(b)), provides as follows:

> "Nature of the hearing; burden of proof.
>
> "Any hearing upon an application shall be a full hearing in which the applicant and all other parties shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues shall be upon the applicant except as otherwise provided in the order of designation."

8,407 persons in an area of 458 square miles (R. 213-214); by KBOX, 8,188 persons in an area of 491 square miles (R. 214); by KVWC, 4,208 persons in an area of 311 square miles (R. 214); by KGKB, 15,958 persons in an area of 492.5 square miles (R. 214); and by KBIX, 6,787 persons in an area of 430 square miles (R. 215).

Although Section 3.24(b) of the Commission's Rules, 47 CFR §3.24(b),[9] provides that an application for a proposed operation will not be granted if interference will be caused to an existing station unless a "satisfactory showing has been made" that "the need for the proposed service outweighs the need for the service which will be lost by reason of such interference," and even though the order of designation placed the burden of proceeding with the introduction of evidence on all issues and the burden of proof upon the applicant, KPLT offered no evidence other than engineering to show either the need for its proposed service or the need for the service of existing stations which would be lost because of objectionable interference. The engineering evidence showed that the area which would gain service from the proposed operation of KPLT, from 20 to 49 miles from its transmitter, already receives service from a total of 43 other stations which provide a minimum of 4 and a maximum of 30 other services to the area (Tr. 82 as corrected by Tr. 120),[10] that at least 8 services are available to 70% of the given area (R. 156), and that the area with only four existing services is a triangular one of approximately 25 square miles more than 30 miles from Paris (Tr. 122). With respect to other services to the areas which would lose service because of interference from the proposed operation, the evidence showed the following number of services to all of each interference area: KTXO, 11 services (R. 214); KBOX, 16 services (R. 214); KVWC, 5 services (R. 214); KGKB, 6 services (R. 215); and KBIX, 5 services (R. 215).

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[9] Section 3.24(b) later was amended and renumbered. The section as it existed at the time of the hearing remains applicable to this proceeding.

[10] Citations given as "Tr. __" are to the hearing transcript and hearing exhibits filed with the Court.

Appellant was willing to accept KPLT's evidence as accurate and, therefore, did not offer evidence of its own. Following issuance by the Hearing Examiner of an initial decision proposing to grant KPLT's application (R. 153-161), the filing of exceptions and supporting briefs (R. 164-183, 190-199), and oral argument (Tr. 39-66), the Commission's Review Board issued a final decision granting KPLT's application (R. 212-221).

In considering the interference to and loss of service by existing stations, the Commission's Review Board divided the stations losing service into two categories; (1) the 250 watt Class IV stations, KVWC, KGKB and KBIX; and (2) the Class II and III adjacent channel stations, KTXO and KBOX, which together would lose service to 16,595 persons in areas totalling 949 square miles (R. 215).

With respect to the interference to the three Class IV stations which together would lose service to 26,953 persons in an area totalling 1,233.5 square miles, the Review Board cited *Iowa Great Lakes Broadcasting Co. (KICD)*, 31 FCC 905, 22 RR 645 (1961), and *WSTV, Inc.*, 31 FCC 694, 21 RR 575 (1961), in support of the conclusion that "there is reason and authority for the proposition that interference to Class IV stations in these circumstances may be considered with less individual concern" (R. 215). The Review Board then stated as follows:

> "The Class IV stations involved in the instant proceeding have not objected to a grant, nor have they attempted to intervene herein. Moreover, the impact of a grant of such Class IV stations is substantially diminished by the first condition attached to the grant herein. Finally the Board must recognize that denial of a requested Class IV power increase on the ground that interference would be caused to 250 watt Class IV stations *might* frustrate the Commission's efforts to effectuate a *nationwide* chain of Class IV stations of 1 kw power" (R. 215-216). (First italics supplied).

The condition attached to the grant was that *KPLT*

> ". . . shall accept such interference as may be imposed by other existing 250 watt Class IV stations in the event

> they are subsequently authorized to increase power to 1,000 watts" (R. 218).

The condition was unrelated to *interference to* and *loss of service by* the three 250 watt Class IV stations, KVWC, KGKB and KBIX.

With respect to the interference to and loss of service by respondents' KTXO and KBOX, the Review Board concluded that the need for the service to be gained outweighed the need for the service which would be lost because there would be a net gain of service to 10,520 persons and to 779 square miles, the interference areas range from 25 to 49 miles from the transmitter sites, that service from KPLT would be substituted in some areas (not shown on the record) for that of respondents' stations, and that all of the interference areas receive primary service from at least 11 to 16 other stations (R. 216).

The Review Board then stated that, even if the interference to the three "Class IV stations were to be considered with that of other classes in this instance, the fact that a net curtailment of coverage would result is not, in and of itself, a disqualifying consideration "because here," as in *WSTV, Inc., supra,* "no areas would lose their only or their second primary service" (R. 217-218). The Board then concluded as follows:

> "Accordingly, these considerations, added to those enumerated above, lead to the conclusion that the need for the KPLT proposed service has been satisfactorily shown to outweigh the need for the service which will be lost by reason of all of the interference received from the KPLT proposal. This conclusion is based on the showing which the applicant presented, considered in the light of the Commission's policy of favoring power increases by Class IV stations. See *Radio Ashland, Inc., supra*" (R. 217).

In disposing of an exception to the initial decision filed by Appellant concerning the burden of proceeding with the introduction of evidence and the burden of proof (R. 164, Exception No. 3), the Review Board ruled as follows:

> "As we have indicated above, KPLT has established a prima facie case for a grant. Under such circumstances, it was incumbent on respondents to come forward with evidence offsetting the applicant's showing. They did not do so. Presumably, respondents' respective programming services meet no special needs of the populations in the interference areas for they did not seek enlargement of the issues to permit such showings. *Regional Radio Service,* 32 FCC 1073, 23 RR 599 (1962)" (R. 218).

Appellant filed a petition for rehearing (R. 235-238) which was denied by a Memorandum Opinion and Order of the Review Board (R. 255-259). In disposing of a contention that KPLT had not sustained its burden of proof, the Review Board first quoted as follows from a 1961 Commission *Report and Order,* 21 RR 1600, amending procedures for processing Class IV station applications seeking power increases:

> "'. . . it is hopeful that demands for hearing may be eased by the expectation, that in all but those cases involving substantial interference, the interference to adjacent channel stations will not override the benefits which can be expected from nationwide Class IV increases in power. Although as indicated, *supra,* adjudication after hearing must necessarily be based upon the record made in the proceeding, the improvement of service to be derived from a nationwide chain of local station power increases will retain a position of superior decisional significance'." (R. 259).

Then the Board stated:

> "Thus, in comparing needs under Rule 73.24 [formerly §3.24], the benefits which can be expected from nationwide Class IV increases in power will retain superior decisional significance unless it can be shown that the need for the service which will be lost in the event of grant overrides such considerations. Where, as here, there is no showing of special need for respondents' service which will be lost, and enlargement of the issues was not sought to make such showing, special needs for such lost service cannot be presumed. *Regional Radio Service,* 32 FCC 1073, 23 RR 599 (1962); *WSTV, Inc., supra*" (R. 259).

In addition, the Review Board denied Appellant's request for waiver of the 1962 freeze which had made it impossible for Appellant to file an application to increase the power of KTXO so as to largely neutralize the adverse effect of a grant of KPLT's application (R. 258).

After the Commission denied an application for review (R. 260-267, 296), Appellant filed a notice of appeal with this Court (R. 291-292).

STATUTES AND RULES INVOLVED

Relevant portions of statutes and rules and regulations of the Federal Communications Commission are set forth in the Argument.

STATEMENT OF POINTS

1. After the Commission had placed the burden of proceeding with the introduction of evidence and the burden of proof upon the applicant, it erroneously shifted both burdens to Appellant without notice.

2. The Commission's policy of encouraging and permitting power increases by local Class IV stations is not of superior decisional significance when weighing the need for the proposed service and the need for service which would be lost by existing stations by reason of interference unless the evidence proves that denial of the application would adversely affect implementation of that policy.

3. Although agreeing with the principle that a policy cannot override a rule, the Commission actually based its decision upon its Class IV power increase policy and gave little or no weight to the evidence.

4. The ultimate conclusion that the public interest, convenience and necessity would be served by the grant of KPLT's application was not supported by the evidence.

5. Because of a recent increase in power by Station KBIX, the record does not now accurately show the interference which the proposed

operation of KPLT would receive from KBIX or the population and area which would gain service from the proposed operation of KPLT.

SUMMARY OF ARGUMENT

I.

In 1958, the Commission amended its rules to permit local Class IV stations to seek increases in daytime power from 250 watts to 1 kw. *Report and Order,* 17 RR 1541. In 1960 and again in 1961, the Commission further amended its rules and procedures to make it possible for more Class IV stations to obtain such power increases and to expedite processing of applications by eliminating, as far as possible, hearings which ultimately would result in grants of the applications. *Report and Order,* FCC 60-1516, 20 RR 1661 (1960); *Report and Order,* FCC 61-601, 21 RR 1600 (1961). In its reports and orders, the Commission discussed its broad policy objective of encouraging and permitting Class IV stations to increase power. However, prospective applicants were cautioned not to overlook the possibility that objectionable interference might be caused to adjacent channel Class II and Class III stations and were urged to consider use of a directional antenna system to prevent such interference. In its *Report and Order,* FCC 61-601, 21 RR 1600, at page 1603, the Commission stated:

> "Thus it behooves each Class IV applicant for power increase to 1 kilowatt, to consider carefully its proposal and to avoid objectionable interference, to other than Class IV operations, by utilization of a directional antenna system, lest action on its application be delayed pending completion of the hearing process."

In February of 1962, the intervenor filed with the Commission an application to increase the daytime power of Class IV station KPLT, Paris, Texas, from 250 watts to 1 kw, without use of a directional antenna (R. 1-39). Because the proposed operation would cause objectionable interference to and loss of service by the existing adjacent channel operations of Appellant's

Class II station KTXO, Sherman, Texas, and Class III station KBOX, Dallas, Texas, the licensees of those stations requested that the application be designated for hearing (R. 44-57).

The KPLT application was designated for hearing by an order released April 15, 1963, and the licensees of KTXO and KBOX were named respondents. The issues specified in the order contemplated, required, and permitted the introduction of only engineering (technical) evidence concerning the areas and populations which might be expected to gain or lose service from the proposed operation of KPLT; whether objectionable interference would be caused to existing stations and, if so, the areas and populations which would lose service; and availability of other services to all such areas and populations (R. 62-63). Because the order of designation made no mention of the burden of proceeding with the introduction of evidence and the burden of proof, both burdens were upon the applicant as provided by Section 1.254 of the Commission's Rules, 47 CFR §1.254.

The evidence proved that KPLT would gain service to 27,115 persons but would cause five existing stations to lose service to 43,548 persons. Adjacent channel stations would suffer the following interference: KTXO, 8,407 persons; KBOX, 8,188 persons. Cochannel Class IV 250 watt stations would suffer interference as follows: KVWC, Vernon, Texas, 4,208 persons; KGKB, Tyler, Texas, 15,958 persons; and KBIX, Muskogee, Oklahoma, 6,787 persons (R. 213-216). The evidence also showed numerous other services available to all areas which would gain or lose service. Because interference would be caused to existing stations, the following provision of Section 3.24(b) of the Commission's Rules was applicable:

> "*Broadcast facilities; showing required.*
>
> "An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:
>
> "(a) . . .

> "(b) That objectionable interference will not be caused, to existing stations or that, *if interference will be caused, the need for the proposed service outweighs the need for the service which will be lost by reason of such interference.*" (Italics supplied).

The applicant's evidence was limited to engineering (technical) data. Both because Appellant was willing to accept the applicant's evidence as accurate and because Appellant believed that the applicant had not met or sustained its burdens of introduction of evidence and proof, Appellant decided not to present rebuttal evidence.

In his initial decision, the Hearing Examiner commented upon the participation by respondents in the hearing. In partially granting an exception to the comments filed by Appellant, the Commission's Review Board stated as follows in its final decision:

> ". . . As we have indicated above, KPLT has established a prima facie case for a grant. Under such circumstances, it was incumbent on respondents to come forward with evidence offsetting applicant's showing. They did not do so. *Presumably, respondents' respective programming services meet no special need of the populations of the interference areas for they did not seek enlargement of the issues to permit such showings.*" (R. 217-218) (Italics supplied).

Appellant took issue with the above statement in its petition for rehearing, and urged that neither the burden of proceeding with the introduction of evidence nor the burden of proof had shifted to Appellant. In rejecting Appellant's contention in its order denying Appellant's petition for rehearing, the Review Board stated that, because the Commission had adopted a nationwide Class IV power increase policy, increases in power by Class IV stations, including KPLT,

> ". . . will retain superior decisional significance unless it can be shown that the *need for the service which will be lost in the event of grant overrides such considerations*. Where, as here, *there is no showing of special need for respondents' service which will be lost,* and enlargement of the issues was not sought to make such showing, *special needs for*

> *such lost service cannot be presumed. Regional Radio Service,* 32 FCC 1073, 23 RR 599 (1962); *WSTV, Inc., supra"* (R. 259). (Italics supplied).

The factual situation in the *Regional Radio* case, cited by the Review Board, was so different as to be inapplicable here. There, the Commission considered this Court's opinion in *Star of The Plains Broadcasting Co. v. Federal Communications Commission,* 105 U.S. App. D.C. 352, 267 F.2d 629 (1959), and correctly held that there is a presumption of need for a local transmission service in a community which receives primary service only from stations 15 or more miles away.

The effect of the rulings of the Review Board was to place both the burden of introduction of evidence and the burden of proof upon Appellant to show that the need for the service which would be lost outweighs the need for the service which would be gained. The effect was to rewrite Section 3.24(b) of the Rules.

Had the applicant (KPLT) presented evidence which raised a presumption of unusual or special need for the new service it proposed to render, such as the first station in a community or service to underserved areas and populations, or had KPLT presented evidence to show that its proposed program service would serve some unusual or special need, the burden of presenting rebuttal evidence most certainly would have been upon Appellant. *But KPLT presented no such evidence.* Its only evidence showed that 43,548 persons would lose service so as to provide a new service to 27,115 persons, and that numerous other services are available to all such persons. *When no special showing of need had been presented, or even attempted, what was there for Appellant to rebut?*

To base the grant of KPLT's application, even in part, upon the fact that Appellant did not offer evidence and did not affirmatively prove a special need for the service which it and other stations would lose was so clearly erroneous as to require that the decision be set aside.

II.

As noted above, Section 3.24(b) of the Commission's Rules provides that, if, a proposal would cause objectionable interference to and loss of service by existing stations, the applicant must make a "satisfactory showing" that the "need for the proposed service outweighs the need for the service which will be lost by reason of such interference."

In its *Report and Order,* FCC 61-601, 21 RR 1600 (1961), the Commission stated as follows:

> "Although as indicated, supra, *adjudication after hearing must necessarily be based upon the record made in the proceeding,* the improvement of service to be derived from a nationwide chain of local station power increases, will retain a position of *superior decisional significance.*"

The Review Board quoted that statement in paragraph 9 of its decision. The Board stated in the preceding paragraph:

> "Finally, the Board must recognize that denial of a requested Class IV power increase on the ground that interference would be caused to 250 watt Class IV stations might frustrate the Commission's efforts to effectuate a *nationwide* chain of Class IV stations of 1 kw power" (R. 216).

In paragraph 9 of its decision, the Board stated:

> "Thus, even insofar as respondents' stations are concerned, in making the determination required by Section 3.24(b) of the Rules a *preference* may be given to the implementation of the broad policy objective of the Commission to encourage and permit higher power for Class IV stations" (R. 216). (Italics supplied).

Again, in denying Appellant's petition for rehearing the Review Board stated in paragraph 8:

> "Thus, in comparing needs under Rule 73.24, the benefits which can be expected from nationwide Class IV increases in power *will retain* superior decisional significance unless it can be shown that the need for the service which will be lost in the event of grant overrides such considerations" (R. 259). (Italics supplied).

If the evidence in this hearing had proved that denial of KPLT's application actually would adversely affect or "frustrate the Commission's efforts to effectuate a *nationwide* chain of Class IV stations of 1 kw power" (R. 216), Appellant would concede that KPLT's application should be granted. However, in the absence of any such evidence, the Commission erred in giving "superior decisional significance", or any consideration whatsoever, to its nationwide policy in weighing the need for the proposed service with the need for the service which would be lost.

III.

In *Hudson Valley Broadcasting Corporation v. Federal Communications Commission,* 116 U.S. App. D.C. 1, 320 F.2d 723 (1963), a case which involved the grant without hearing of a Class IV station to increase power from 250 watts to 1 kw in a manner which might contravene the Commission's multiple ownership rules, this Court stated that "The Class IV power increase policy . . . has always been subordinated to other Commission policies." Although the Review Board asserted in paragraph 12 of its decision, that

> "The [Class IV power increase] policy does not override a hearing record or a rule; the policy has been considered in applying the rule to the hearing record" (R. 217).

Appellant respectfully submits that the Review Board actually applied the policy in a manner which subordinated the rule, Section 3.24(b).

In considering the interference to and loss of service by existing stations, the Review Board divided the stations into two categories: (1) the 250 watt cochannel Class IV stations which together would lose service to 26,953 persons; and (2) the Class II and Class III adjacent channel stations, KTXO and KBOX, which together would lose service to 16,595 persons (R. 215). Then the Board first compared the gain with the loss of each group, ignoring the loss of the other group. The

result was that the gain in service was considered twice. For example, when considering the Class IV group, the net gain in service would be 162 persons, and when considering the adjacent channel group, the net gain in service would be 10,520 persons. However, instead of the net gain from the proposed operation being the sum of those two figures, or 10,682 persons, the loss in service would be 16,433 persons.

In support of giving "superior decisional significance" to the Class IV power increase policy, the Review Board quoted the following from the Commission's *Report and Order,* FCC 61-601, 21 RR 1600 (1961):

> "Thus, even insofar as respondents' stations are concerned, in making the determination required by Section 3.24(b) of the Rules, a *preference may be given* to the implementation of the broad policy objective of the Commission to encourage and permit higher power for Class IV stations" (R. 216).

Appellant respectfully submits that the facts, particularly the net loss of service of 16,433 persons, plus the Review Board's reliance upon the unequivocal statement that "preference may be given to the implementation" of the Class IV power increase policy and the repeated statements that the policy must be given "superior decisional significance", conclusively proves that the grant of the KPLT application was not based upon the showing made by the applicant at the hearing but actually was based upon the Class IV power increase policy.

IV.

Throughout this proceeding, Appellant has contended that the public interest, convenience and necessity would not be served by granting an application which would cause a net loss of service to 16,433 persons in areas totalling 454.5 square miles, and that KTXO would suffer interference to such a degree that its service would be reduced to an unsatisfactory degree. In support, Appellant cited the "fair, efficient, and equitable distribution of radio service" requirement of Section 307(b) of the

Communications Act of 1934, 47 USC §307(b), as amended, and the Commission's ten per cent rule, Section 73.28(d)(3), 47 CFR §73.28(d)(3).

In support of its decision, the Review Board cited a number of prior decisions of the Commission. A review of the decisions has shown that they either are not applicable to the facts and principles present here or contain the same errors which are the basis of this appeal.

It is respectfully submitted that the decisions must be set aside because the facts clearly prove that the service of KTXO would be reduced to such an unsatisfactory degree that the basic objectives of Section 307(b) of the Act would not be achieved.

V.

Since issuance of the final decision on January 10, 1964, the Commission has authorized Class IV station KBIX, Muskogee, Oklahoma, to increase its daytime power from 250 watts to 1 kw. (The KBIX application was granted on June 3, 1964.) In paragraph 6 of its order denying Appellant's petition for rehearing, the Review Board noted that the KBIX application had been filed with the Commission on January 23, 1963 (R. 257).

Because the proposed operation of KPLT received some interference from the 250 watt operation of KBIX, it is obvious that any increase in power by KBIX will cause additional interference to and less new service by KPLT. It follows that the need for the proposed service of KPLT will be less than shown in the record.

When conditions have changed following a final decision and before action upon an appeal to the extent that "the state of the record might preclude a just result", this Court has remanded cases for further consideration in light of the changed facts. *Fleming & McNutt v. Federal Communications Commission,* 96 U.S. App. D.C. 223, 225 F.2d 523 (1955); *Enterprise Company v. Federal Communications Commission,* 97 U.S. App. D.C. 374, 231 F.2d 708 (1955).

Although Appellant recognizes the desirability of finality in administrative proceeding, it respectfully submits that the factual situation existing here justifies a remand to the Commission so that the record can be brought up-to-date.

ARGUMENT

I.

After the Commission Placed the Burdens of Introduction of Evidence and Proof Upon the Applicant, It Shifted Both Burdens to Appellant Without Notice.

Section 1.254 of the Commission's Rules, 47 CFR §1.254,[11] provides as follows:

> "*Nature of the hearing; burden of proof.*
>
> "Any hearing upon an application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof, upon all such issues shall be upon the applicant except as otherwise provided in the order of designation."

The Commission's order of designation, released April 15, 1963, was silent as to the burden of proceeding with the introduction of evidence as well as to the burden of proof (R. 62-63). Therefore, both burdens were upon the applicant, KPLT.

The issues specified by the Commission in its order of designation contemplated, required and permitted the introduction of only engineering (technical) evidence concerning the areas and populations which might be expected to gain or lose service from the proposed operation of KPLT

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[11] At the time the Commission designated KPLT's application for hearing (R. 62-63), Section 1.254 was numbered Section 1.140(b).

with 1 kilowatt of power; whether objectionable interference would be caused to existing stations from the proposed operation and, if so, the areas and populations affected thereby; and other services available to all such areas and populations[12] (R. 62-63).

The applicant presented the engineering (technical) evidence required by the issues (Tr. 79-122). Because the evidence proved that objectionable interference would be caused to five stations by the proposed operation of KPLT, the applicant was required by Section 3.24(b) of the Commission's Rules to make a satisfactory showing that "the need for the proposed service outweighs the need for the service which will be lost by reason of such interference."[13]

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[12] The following issues were specified by the order of designation:

"1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station KPLT and the availability of other primary service to such areas and populations.

"2. To determine whether the proposal of KPLT, Inc. would cause objectionable interference to Stations KBOX and KTXO, Dallas and Sherman, Texas, respectively, or any other existing standard broadcast station, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

"3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity" (R. 62-63).

[13] Section 3.24 later was amended and renumbered. The section as it existed at the time of the hearing, which is applicable to this proceeding, provides as follows:

"Broadcast facilities; showing required.

"An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:

"(a) That the proposed assignment will tend to effect a fair, efficient and equitable distribution of radio service among the several states and communities.

"(b) That objectionable interference will not be caused to existing stations or that, if interference will be caused, the need for the proposed service outweighs the need for the service which will be lost by reason of such interference."

Both because Appellant was willing to accept the applicant's evidence as accurate,[14] and because Appellant believed the applicant had not met or sustained the burdens of introduction of evidence and proof, Appellant decided not to present rebuttal evidence.

The Hearing Examiner, in his initial decision, commented upon Appellant's participation in the hearing.[15] In denying an exception by Appellant, the Review Board stated as follows:

> "13. KTXO argues also that the burden of proof under Section 3.24 was on the applicant; that KTXO agreed with the 'only evidence (engineering data) introduced by KPLT'; that there was no need for KTXO to rebut that evidence, and that KPLT would enlarge its service area at the cost of destroying existing service. In substance, KBOX joins in this contention. As we have indicated above, KPLT has established a prima facie case for a grant. Under such circumstances, it was incumbent on respondents to come forward with evidence offsetting the applicant's showing. They did not do so. *Presumably, respondents' respective programming services meet no special needs of the populations in the interference areas for they did not seek enlargement of the issues to permit such showings. Regional Radio Service,* 32 FCC 1073, 23 RR 599 (1962)" (R. 217-218). (Italics supplied).

Appellant took issue with the above statement in its petition for rehearing and renewed its contention that the burden of proof under Section 73.24 (formerly Section 3.24) of the Commission's Rules was on the

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[14] A draft of applicant's exhibits had been supplied to other parties before they were prepared in final form for submission at the hearing so that differences of opinion as to accuracy could be resolved by informal discussions and agreements among the parties. This informal procedure has been followed by the Commission for many years with excellent results.

[15] The following appears in paragraph 14 of the Initial Decision:

> "Furthermore, while the licensees of Stations KBOX and KTXO object to grant of KPLT's application and have participated in the hearing neither may properly contend on the basis of the record in this proceeding, which they have been afforded every opportunity to develop, that the listening public in the interference areas concerned will be deprived of needful services from their stations if KPLT's application is granted" (R. 159).

applicant and that the applicant had failed to sustain its burden (R. 228). In response, the Review Board first quoted from the Commission's *Report and Order*, 21 RR 1600, in which the Commission had stated that ". . . the improvement of service to be derived from a nationwide chain of local station power increases will retain a position of superior decisional significance", and then stated as follows:

> "Thus, in comparing needs under Rule 73.24 [formerly 3.24], the benefits which can be expected from nationwide Class IV increases in power will retain superior decisional significance *unless it can be shown that the need for the service which will be lost in the event of grant overrides such considerations*. Where, as here, there is no showing of special need for respondents' service which will be lost, and enlargement of the issues was not sought to make such showing, *special needs for such lost service cannot be presumed. Regional Radio Service*, 32 FCC 1073, 23 RR 599 (1962); *WSTV, Inc., supra.*" (R. 259) (Italics supplied).

As noted above, Section 3.24(b) specifically provides that an application which would cause interference to an existing station will not be granted unless "a satisfactory showing has been made" that "the need for the proposed service *outweighs* the need for the service which will be lost by reason of such interference." (Italics supplied). Unless otherwise provided by the order of designation, the burden of proving that need is upon the applicant. However, the Review Board's pronouncement that an application which would cause interference to an existing station will not be granted "unless it can be shown that the need for the service which would be *lost* in the event of grant *overrides* such considerations" (R. 259) (Italics supplied), actually revises Section 3.24(b) by shifting the burden upon the station receiving interference.

In support of its interpretation and application of Section 3.24(b), the Review Board, both in its final decision and in its order denying Appellant's petition for rehearing, cited and relied upon an earlier decision of the Commission, *Regional Radio Service*, 32 FCC 1073, 23 RR 599 (1962). A review of that decision establishes that it does not support the Review Board's pronouncement.

Regional Radio involved an application for a construction permit for the first station at Rantoul, Illinois, which would provide a new primary service to more than 153,000 persons and which would cause an existing adjacent channel station to lose service to 12,535 persons. Although Rantoul already received primary service from four existing stations, two in communities only 15 miles away, and the 153,000 persons already received primary service from at least ten existing stations, the Commission applied this Court's opinion in *Star of The Plains Broadcasting Co. v. Federal Communications Commission,* 105 U.S. App. D.C. 352, 267 F.2d 629 (1959), and correctly held as follows:

> "While the rendition of a first local transmission service to a community is not an absolute consideration, a strong presumption of need for a proposed service arising therefrom regarding which WMBD offered no rebuttal evidence during the course of the hearing."

Had KPLT presented evidence which raised a presumption of unusual or special need for the new service it proposed to render, such as the first station in a community or service to underserved areas and populations, or had KPLT presented evidence to show that its proposed program service would serve some unusual or special need, the burden of presenting rebuttal evidence most certainly would have been upon Appellant. *But KPLT presented no such evidence.* Its evidence only showed that additional service would be provided to 27,115 persons in areas 20 to 49 miles from its transmitter who already have service available from numerous other stations, and that 43,548 persons would lose service because of interference from the proposed operation of KPLT. *When no special showing of need had been presented, or even attempted, what was there for Appellant to rebut?*

The practical effect of the Review Board's pronouncements that "Presumably, respondents' respective programming services meet no special needs of the populations in the interference areas for they did not seek enlargement of the issues to permit such showings" (R. 218),

and that ". . . special needs for such lost service cannot be presumed" (R. 259), was to unlawfully and without notice place the burden of proceeding with the introduction of the evidence as well as the burden of proof upon the Appellant contrary to the explicit provisions of Sections 1.254 and 3.24(b) of the Commission's Rules.

To base the grant of KPLT's application, even in part, upon the fact that Appellant did not offer evidence and did not affirmatively prove a special need for the service which it and other stations would lose was so clearly erroneous as to require that the Commission decision be set aside.

II.

The Commission's Policy of Encouraging and Permitting Power Increases by Local Class IV Stations Is Not of Superior Decisional Significance Unless Evidence Proves That Denial of the Application Would Adversely Affect Implementation of That Policy.

In 1958, after a rule making proceeding, the Commission amended its rules to permit local Class IV stations to seek increases in daytime power from 250 watts to 1 kw. *Report and Order*, 17 RR 1541. In 1960 and again in 1961, the Commission amended its rules and procedures to make it possible for more Class IV stations to obtain such power increases and to expedite processing of applications by eliminating, as far as possible, hearings which ultimately would result in grants of the applications, *Report and Order*, FCC 60-1516, 20 RR 1661 (1960); *Report and Order*, FCC 61-601, 21 RR 1600 (1961). In the latter report and order, at page 1603, the Commission stated as follows at the end of paragraph 10:

> "Although as indicated, supra, *adjudication after hearing must necessarily be based upon the record made in the proceeding*, the improvement of service to be derived from a nationwide chain of local station power increases, will retain a position of *superior decisional significance*." (Italics supplied).

That the Review Board gave great weight to the statement that "the improvement of service to be derived from a nationwide chain of local power increases, *will retain a position of superior decisional significance*", (Italics supplied), is readily apparent by its action in quoting the statement in both paragraph 9 of its decision (R. 216) and paragraph 8 of its order denying Appellant's petition for rehearing (R. 259).

Even though the Review Board acknowledged that "adjudication after hearing must necessarily be based upon the record made in the proceeding", no evidence was offered to show that denial of KPLT's application would, or even might, either adversely affect implementation of the nationwide policy or prevent a single Class IV station from increasing power to 1 kw. Nevertheless, the Review Board repeatedly gave great weight to the possible adverse effect of a denial of KPLT's application. At the end of paragraph 8 of its decision the Board stated:

> "Finally, the Board must recognize that denial of a requested Class IV power increase on the ground that interference would be caused to 250 watt Class IV stations might frustrate the Commission's efforts to effectuate a *nationwide* chain of Class IV stations of 1 kw power" (R. 216).

In paragraph 9 of its decision, the Board stated:

> "Thus, even insofar as respondents' stations are concerned, in making the determination required by Section 3.24(b) of the Rules a preference may be given to the implementation of the broad policy objective of the Commission to encourage and permit higher power for Class IV stations" (R. 216).

Again, in denying Appellant's petition for rehearing, the Review Board stated in paragraph 8:

> "Thus, in comparing needs under Rule 73.24, the benefits which can be expected from nationwide Class IV increases in power will retain superior decisional significance unless it can be shown that the need for the service which will be lost in the event of grant overrides such considerations" (R. 259).

If the evidence in this hearing had proved that denial of KPLT's application actually would adversely affect or "frustrate the Commission's efforts to effectuate a *nationwide* chain of Class IV stations of 1 kw power" (R. 216), Appellant would concede that KPLT's application should be granted. However, in the absence of any such evidence, the Commission erred in giving "superior decisional significance", or any consideration whatsoever, to its nationwide policy in weighing the needs for the service which would be gained with the needs for the service which would be lost.

It is respectfully submitted that, because of this most prejudicial error, the decision must be set aside.

III.

Although Agreeing to the Principle That a Policy Cannot Override a Rule, the Commission Actually Based Its Decision Upon Its Class IV Power Increase Policy.

As noted in the foregoing discussion, the Review Board gave great weight to the Commission's policy of encouraging and permitting local Class IV stations throughout the nation to increase power to 1 kw. In fact, the Board gave so much weight to the policy that it concluded that the need of 27,115 persons for an additional service outweighed the need of 43,548 persons for service which would be lost because of interference. Both in its petition for rehearing (R. 221-229) and in its application for review (R. 260-267), Appellant cited *Hudson Valley Broadcasting Corporation v. Federal Communications Commission*, 116 U.S. App. D.C. 1, 320 F.2d 723 (1963),[16] in support of its contention that the requirements

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[16] Hudson Valley was an appeal from a grant without hearing of an application by a Class IV station to increase power from 250 watts to 1 kw and to increase the efficiency of its antenna system. Appellant there had charged that the service area of the proposed operation would overlap the service area of a commonly-controlled station in violation of the Commission's multiple ownership rules. The Court there stated that

> "The Class IV power increase policy . . . has always been subordinated to other Commission policies."

of Section 3.24(b) of the Commission's Rules could not be subordinated to the Commission's Class IV power increase policy. In response, the Review Board stated as follows in paragraph 12 of its decision:

> "The policy does not override a hearing record or a rule; the policy has been considered in applying the rule to the hearing record" (R. 217).

Appellant respectfully submits that the Review Board actually applied the policy in a manner which subordinated the rule, Section 3.24(b).

In considering the interference to and loss of service by existing stations, the Review Board divided the stations losing service into two categories: (1) the three 250 watt cochannel Class IV stations which together would lose service to 26,953 persons; and (2) the Class II and Class III adjacent channel stations, KTXO and KBOX, which together would lose service to 16,595 persons (R. 215).

After having divided the stations which would receive interference and lose service into the two categories, the Review Board then proceeded to consider each category separately, and to ignore the other. By this technique, the gain in service was considered twice, once in paragraph 8 when considering the interference to only the three Class IV stations, and once in paragraph 9 when considering the interference to only the two adjacent channel figures. When considering only the Class IV stations, the net gain in service would be 162 persons (27,115 - 26,953). When considering only the adjacent channel stations, the net gain in service would be 10,520 persons (27,115 - 16,595). The total of the two is 10,682 persons. Actually, however, the net loss of service would be 16,433, because a total of 43,548 persons would lose service while only 27,115 persons would gain service. It is noted that the Board did not state, either in its decision or in its order denying Appellant's petition for rehearing that the net loss of service would be 16,433 persons and 2,182.5 square miles, but left the calculations to others.

With respect to the interference to the three Class IV stations, the Board concluded, in paragraph 8 of its decision, that the need for the

proposed service outweighed the need for the service which would be lost even *though the net gain in service, considering only the Class IV stations, would be only 162 persons:*

> "While the provisions of Sections 3.24(b) of the Rules, which require that a 'satisfactory showing' be made that 'the need for the proposed service outweighs the need for the service which will be lost by reason of such interference must be lost by reason of such interference' must be applied to all interference to be caused by a proposal, there is reason and authority for the proposition that interference to Class IV stations in these circumstances may be considered with less individual concern. *Iowa Great Lakes Broadcasting Co. (KICD),* 31 FCC 905, 22 RR 645 (1961); *WSTV, Inc.,* 31 FCC 694, 21 RR 575 (1961)." (R. 215)

When the net gain in service would be only 162 persons, and when there is no evidence that a denial of KPLT's application would adversely affect or "frustrate" the policy for nationwide power increases by Class IV stations, it is clear that the requirements of Section 3.24(b) were subordinated to the Class IV power increase policy.

Unfortunately, subordination of Section 3.24(b) to the Class IV policy also occurred again when the Board considered the loss of service by the two adjacent channel stations. The Board first stated, in paragraph 9 of its decision, that:

> "Our major concern, therefore, is with the additional adjacent channel interference which would be received by respondents' Class II and Class III stations" (R. 216).

Then the Board once again discussed at some length the Class IV power increase policy, quoted from the Commission's *Report and Order,* FCC 61-601, 21 RR 1600, which has been quoted and discussed earlier in this brief, and stated as follows:

> "Thus, even insofar as respondents' stations are concerned, in making the determination required by Section 3.24(b) of the Rules, a *preference may be given* to the implementation of the broad policy objective of the Commission to encourage and permit higher power for Class IV stations" (R. 216).

The Board's clear-cut statement that it gave preference to the Class IV power increase policy conclusively proves that Section 3.24(b) was subordinated to the policy.

But that was not all. *Even though the net loss in service* would be 16,433 persons, the Board held as follows in paragraph 10 of its decision:

> "Even if the interference to Class IV stations were to be considered with that of other classes in this instance, the fact that a net curtailment of coverage would result is not, in and of itself, a disqualifying consideration. . . . This conclusion is based upon the showing which the applicant presented, considered in the light of the Commission's policy favoring power increases by Class IV stations" (R. 216-217).

Appellant respectfully submits that the facts, as well as the Review Board's own unequivocal statements conclusively prove that the requirements of Section 3.24(b) of the Commission's Rules were subordinated to the Class IV power increase policy. For this reason alone, the decision should be set aside.

IV.

The Conclusion That the Public Interest Would Be Served by Grant of the Application Is Not Supported by the Evidence.

The evidence proves that, for KPLT to gain service to 27,115 persons in an area of 1,728 square miles, from 20 to 49 miles from its transmitter, 43,548 persons in an area totalling 2,182.5 square miles would lose service. In the case of KGKB, Tyler, Texas, the loss of service would occur as close as 14 miles from its transmitter (R. 114). Under such circumstances, it is respectfully submitted that the facts simply do not support the Review Board's conclusions that the need for the proposed service of KPLT outweighs the service which would be lost by five stations, and that the public interest, convenience and necessity would be served by a grant of the application.

In support of its conclusion that the need for the proposed service outweighs the need for the service which would be lost because of interference, the Review Board cited a number of prior decisions of the Commission. A review of the decisions has shown that they either are not applicable to the facts and principles present here or contain the same errors which are the basis of this appeal. Because none shed light upon the questions presented here, no useful purpose will be served at this time by discussion of each decision.

Section 307(b) of the Communications Act of 1934, as amended, 47 USC §307(b), 49 Stat. 1475, provides as follows:

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is a demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

To implement Section 307(b), the Commission has adopted Section 73.28(d)(3) of its Rules, 47 CFR §73.28(d)(3), the so-called ten per cent rule, to prevent the establishment of a new station or change in the facilities of an existing station (with exceptions not applicable here) where interference would be suffered to such a degree that its service would be reduced to an unsatisfactory degree. *Reese Broadcasting Corp.*, 1 RR 2d 1061 (1964). Section 73.28(d)(3) provides, in pertinent part, as follows:

> "(3) The interference received does not affect more than 10 per cent of the population in the proposed station's normally protected primary service area; . . ."

If interference in excess of ten per cent would reduce a station's service to an unsatisfactory degree, it must be concluded that the proposed operation of KPLT would reduce the service of Appellant's KTXO to an "unsatisfactory degree" because 13.3% of the population within KTXO's normally protected primary service area would be subjected to interference.

It is respectfully submitted that the decision should be set aside because the grant of KPLT's application would reduce KTXO's service to an "unsatisfactory degree".

In summary, it is respectfully submitted that the facts simply do not support the Review Board's conclusion that the need for service outweighs the need for the service which would be lost because of interference, and that a grant of KPLT's application would serve the public interest, convenience and necessity.

V.

The Record Does Not Accurately Show the Populations and Areas Which Would Gain Service from the Proposed Operation.

One of the three 250 watt cochannel Class IV stations which would cause interference to the proposed operation of KPLT is KBIX, Muskogee, Oklahoma. In paragraph 6 of its order denying Appellant's petition for rehearing, the Review Board noted "that one of the Class IV stations under consideration herein, Station KBIX, Muskogee, Oklahoma, filed an application for a power increase to 1 kw on January 23, 1963 (BP-15844)." (R. 257). In its notice of appeal, Appellant stated that it intended to rely upon "The Commission's reference to and reliance upon a pending application for an increase in the daytime power of Station KBIX..."

Since filing its notice of appeal, Appellant has learned that the KBIX application was granted without a hearing on June 3, 1964. Therefore, it it obvious that the proposed operation of KPLT would suffer additional interference from KBIX, and would serve fewer people than shown in this record. Thus, the need for the proposed service will be less than shown in the record.

When conditions have changed following a final decision and before action upon an appeal to such an extent that "the state of the record might

preclude a just result", this Court has remanded cases for further consideration in light of the changed facts. *Fleming & McNutt v. Federal Communications Commission*, 96 U.S. App. D.C. 223, 225 F.2d 523 (1955); *Enterprise Company v. Federal Communications Commission*, 97 U.S. App. D.C. 374, 231 F.2d 708 (1955).

Although Appellant recognizes the desirability of finality in administrative proceedings, the note in the order denying Appellant's petition for rehearing clearly establishes that the Commission was aware of the possibility that the facts of record would be no longer applicable. It is respectfully submitted that, under the factual situation existing here, a remand to the Commission with instructions to bring the record up-to-date is appropriate.

CONCLUSION

For the foregoing reasons, Appellant respectfully submits that the Commission's decision, released January 10, 1964, should be set aside and reversed and the proceeding remanded to the Commission with instructions to grant Appellant's application and such other relief as this Court may direct.

Respectfully submitted,

ROBERT M. BOOTH, JR.
1735 DeSales Street, N.W.
Washington, D.C. 20036
Counsel for Appellant
O'Connor Broadcasting Corporation

January 21, 1965.

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,~~873~~ 774

O'CONNOR BROADCASTING CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

KPLT, INC.,
Intervenor.

ON APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

HENRY GELLER,
General Counsel,

JOHN H. CONLIN,
Acting Associate
General Counsel,

MICHAEL FINKELSTEIN,
Counsel.

Federal Communications Commission
Washington, D. C. 20554

STATEMENT OF QUESTIONS PRESENTED

The questions presented, as agreed to by the parties in a stipulation approved by the Court on November 23, 1964, are as follows:

1. Whether the Commission's conclusion that the need for the proposed service of Station KPLT outweighs the need for the service of existing stations, including Station KTXO, which will be lost by reason of interference from the proposed operation is supported by the evidence.

2. Whether the Commission's reliance upon its policy to encourage Class IV stations to increase daytime power on a nationwide basis was erroneous.

3. Whether the Commission's conclusion that the applicant has made a prima facie case for the grant of its application and that the burden was upon the Appellant to come forward with offsetting evidence was erroneous.

4. Whether the Commission's reference to and reliance upon a pending but ungranted application for an increase in the daytime power of Station KBIX was erroneous.

5. Whether the grant of the application to increase the daytime power of Station KPLT satisfies the fair, efficient and equitable distribution of radio service provision of Section 307(b) and the public interest, convenience and necessity provision of Section 309 of the Communications Act of 1934, as amended.*

6. Whether the Commission's refusal to attach appropriate

*Appellee and Intervenor reserved the right to argue that this question is not properly before the Court.

conditions or waivers to the grant of the application to increase the daytime power of Station KPLT which would permit Appellant to file an application to neutralize or offset the loss of service by its Station KTXO was erroneous.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant's statement of the case is somewhat argumentative. It is therefore believed that the following further statement may be of assistance to the Court.

This is an appeal brought pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b), from (1) a decision of the Review Board of the Federal Communications Commission which granted after hearing the application of intervenor KPLT, Inc., (KPLT) to increase from 250 to 1,000 watts the daytime power of Class IV standard broadcast (AM) station KPLT,[1/] which

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1/ Pursuant to Section 73.21(c)(1) of the Commission's Rules, 47 CFR 73.21(c)(1), a Class IV station "is a station operating on a local channel and designed to render service primarily to a city or town and the suburban and rural areas contiguous thereto. The power of a station of this class shall not be less than 0.1 kilowatt, and not more than 0.25 kilowatt nighttime and 1 kilowatt daytime . . ."

operates on the frequency of 1490 kc at Paris, Texas; (2) a Memorandum Opinion and Order of the Review Board denying reconsideration; and (3) an Order of the Commission denying appellant's application for review of the Review Board's decision. [2] KPLT requested an increase in power pursuant to the Commission's policy, first enunciated in 1958, of encouraging all Class IV stations to increase daytime power from 250 to 1000 watts in order to provide a more satisfactory signal to the areas they were designed to serve. See Power Limitation of Class IV Stations, 17 Pike & Fischer, R.R. 1541 (1958).

Appellant, O'Connor Broadcasting Corporation, (O'Connor), is the licensee of Class II standard broadcast (AM) station KTXO, [3] which operates on the frequency of 1500 kc at Sherman, Texas and which will receive objectionable interference within its normally protected service area, [4] from KPLT's proposed operation. Because of the ob-

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2/ Under Section 5(d)(3) of the Communications Act of 1934, as amended, 47 U.S.C. 155(d)(3), a decision of the Review Board has the same force and effect as a decision of the Commission unless it is reviewed by the Commission.

3/ Pursuant to Section 73.21(a)(2), of the Commission's Rules, 47 CFR 73.21(a)(2), a Class II station "is a secondary station which operates on a clear channel (see §73.25) and is designed to render service over a primary service area which is limited by and subject to such interference as may be received from Class I stations."

4/ The normally protected service area of a standard broadcast (AM) station is described in Beaumont Broadcasting Corp. v. Federal Communications Commission, 91 U.S. App. D.C. 111, 115, 202 F.2d 306, 309 (1952), as follows:

> ". . . each standard radio broadcasting station normally enjoys freedom from objectionable electrical interference up to a point where its broadcast signal is of a designated strength. The imaginary line connecting all of these points in every direction around a station is called the station's normally protected contour." [Footnote omitted.]

jectionable interference KPLT's increase in power would cause to appellant's station, as well as to other AM stations, the Commission on April 15, 1963 designated KPLT's application for hearing on the following issues (R. 62-3):

1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station KPLT and the availability of other primary service to such areas and populations.

2. To determine whether the proposal of KPLT, Inc. would cause objectionable interference to Stations KBOX and KTXO, Dallas and Sherman, Texas, respectively, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

At the hearing, it was established (R. 213) that the increase in power proposed by Station KPLT "would bring a new daytime service to 27,115 additional persons in an area of 1,728 square miles, thereby raising applicant's total daytime coverage to 96,152 persons in an area of 4,919 square miles." It was further established, (ibid) that "no person now served by KPLT would lose its service" and that a fifth primary service would be provided to the city of Hugo, Oklahoma.

With respect to the service that would be lost as a result of KPLT's power increase, it was established (R. 213-5) that objectionable interference would be caused to five AM stations resulting in a loss of service to a total of 43,548 persons. None of the persons so effected would be left without primary service; all would

continue to receive primary service from a minimum of five AM stations.

In addition, it was found (R. 214-5) that the greatest loss from an increase in power by KPLT -- involving 26,953 persons -- would result from interference caused to three other Class IV stations operating with less than the maximum power permitted under the Commission's Rules.[5/] Of the remaining two stations effected, 8,407 persons would lose service from appellant's Station KTXO, thereby raising to 20,996 the total number of persons unable to receive service from that station as a result of the operation of KPLT. All the persons losing service from KTXO would continue to receive primary service from at least eleven other AM stations. In addition, 8,188 persons would lose service from Station KBOX, Dallas, Texas; all persons losing service from that station would continue to receive primary service from at least sixteen other AM stations.

In an Initial Decision released on July 25, 1963 (R. 153-161), the hearing examiner concluded that KPLT's application should be granted. The Initial Decision was affirmed by the Review Board in a decision released on January 10, 1964 (R. 212-218).

In its decision, the Review Board held that the crucial consideration was whether pursuant to then Section 3.24(b) of the Commission's Rules a "satisfactory showing" had been made that "the need for the proposed service outweighed the need for the service

5/ See note 1, supra, p. 1.

which would be lost . . ."[6/]

In holding that such a showing had been made in this case, the Review Board concluded first (R. 215) that "less individual concern" was warranted with respect to most of the service that would be lost as a result of KPLT's power increase, since such loss was from Class IV stations operating with less than 1,000 watts power. These stations, too, are eligible and are encouraged to increase their power to 1000 watts under the Commission's new Class IV policy and upon the issuance of such authorization, this loss of service would be restored. Moreover, as the Review Board noted (ibid.), the licensees of these stations did not object to a grant of the KPLT application.

Insofar as the adjacent channel interference to KTXO was concerned,

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6/ At the time of the Review Board's decision, Section 3.24(b) of the Commission's Rules provided in pertinent part that:

> . . . an authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:
>
> * * * *
>
> (b) that objectionable interference will not be caused to existing stations or that, if interference will be caused, the need for the proposed service outweighs the need for the service which will be lost by reason of such interference . . .

Section 3.24(b) was renumbered as Section 73.24(b) on December 16, 1963, 28 F.R. 13576, and was subsequently amended in an order adopted July 1, 1964, 29 F.R. 9492. However, the amendment expressly provided that the former rule would still apply to "applications accepted for filing before July 13, 1964."

the Review Board noted that the Commission had previously stated, Processing Procedure for Class IV Stations, 21 Pike & Fischer, R.R. 1600, 1603, that:

> It is hopeful that demand for hearing may be eased by the expectation, that in all but those cases involving substantial interference, the interference to adjacent channel stations will not override the benefits which can be expected from nationwide Class IV increases in power. Although as indicated, supra, adjudication after hearing must necessarily be based upon the record made in the proceeding, the improvement of service to be derived from a nationwide chain of local station power increases will retain a position of superior decisional significance.

Therefore, the Review Board concluded (R. 216) that "in making the determination required by Section 3.24(b) of the Rules a preference may be given to the implementation of the broad policy objectives of the Commission to encourage and permit higher power for Class IV stations. When we add to this preference the other factors reflected in the record of this proceeding, we must conclude, that, together, they call for a grant of KPLT's application."

As the Review Board pointed out (ibid.), "these additional factors include the facts that no person now served by KPLT would lose service; that a new daytime service would be provided to 27,115 additional persons;" that excluding the loss to other Class IV stations "there would be a net gain over losses . . . of 10,520 persons . . . and that all of the interference areas receive primary service (0.5 mv/m or greater) from at least 11 to 16 other stations."

Following the Review Board's decision, appellant filed a

petition for rehearing (R. 221-229) which was denied by the Review Board in a Memorandum Opinion and Order released on May 11, 1964 (R. 255-259). Appellant's application for Commission review of the Board's decision (R. 260-267) was denied in an order released September 8, 1964 (R. 290) and this appeal followed.

SUMMARY OF ARGUMENT

I.

The Review Board properly decided that a grant of KPLT's application to increase the power of its Class IV station to 1000 watts would be in the public interest, since, as required by former section 3.24(b) of the Commission's rules, it had been shown that the need for the proposed increase in service outweighed the need for the service which would be lost. The Review Board found that a grant of KPLT's application would bring a new daytime service to 27,115 persons and that a minimum of five other primary services would continue to be available to all persons losing service. Additionally, the Review Board considered a prior Commission ruling according "decisional significance" to the Commission's goal of improving Class IV service through a nationwide system of 1000-watt Class IV stations.

The Review Board also concluded that the fact that an increase in power by KPLT would result in a net loss in service (i.e., a greater number of persons will lose service from other stations than will gain service from KPLT) did not outweigh the above considerations. This conclusion was proper since most of the persons so effected will lose service from three other Class IV stations, which could also increase their power to 1000 watts and thereby restore the service lost as a result of KPLT's power increase.

The Review Board's consideration of the Commission's policy of encouraging increases in power by Class IV stations was proper in this case since the Commission's goal of a nationwide system of 1000-watt Class IV stations would be frustrated to the extent that any application of a Class IV station eligible for an increase in power to 1000 watts was denied. Moreover, the Review Board did not subordinate former Section 3.24 of its Rules to that policy in contravention of this Court's decision in Hudson Valley Broadcasting Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 1, 320 F.2d 723 (1963). The Review Board found that there was no conflict between that section and the Commission's policy and, indeed, that a grant of KPLT's application would be consistent with the former rule.

Appellant did not present to the Review Board its argument that a grant of KPLT's application would make the operation of its station inconsistent with the Commission's "ten percent" rule, and, therefore, it comes too late now. Communications Act, Sec. 405, 47 U.S.C. 405; Albertson v. Federal Communications Commission, 100 U.S. App. D.C. 103, 105, 243 F.2d 209, 211 (1956). In any event, the argument is without merit since the "ten percent" rule, by its terms, applies only to applications for new or changed facilities and not to existing operations.

II.

The Review Board did not improperly impose the burden of proof in this case upon appellant; rather, after finding that KPLT had "established a prima facie case for a grant" of its application,

the Review Board merely shifted to appellant the burden of going forward with evidence offsetting KPLT's showing. Such a shift was clearly proper since it is well settled that "upon the establishment of a prima facie case the burden of evidence or the burden of going forward with the evidence shifts to the [other] party." Delaware Coach Co. v. Savage, 81 F. Supp. 293, 296 (D.C.Del., 1948). See also, Kortz v. Guardian Life Insurance Co. of America, 144 F.2d 676 (C.A. 10, 1944); Miller v. Kruggel, 165 Kan. 435, 195 P.2d 597 (1948); 9 Wigmore on Evidence, 3d ed., Sec. 2489.

ARGUMENT

I. THE REVIEW BOARD PROPERLY CONCLUDED THAT A GRANT OF KPLT'S APPLICATION WAS CONSISTENT WITH THE COMMISSION'S RULES AND WOULD BE IN THE PUBLIC INTEREST.

In this case, the Review Board granted an application of intervenor KPLT to increase the daytime power of its Class IV AM station from 250 to 1000 watts. This action implemented a general policy decision previously made by the Commission after a full rulemaking proceeding that Class IV stations could more effectively operate in the public interest if their daytime power ceiling was raised from 250 watts to 1000 watts. Power Limitation of Class IV Stations, 17 Pike & Fischer, R.R. 1541 (1958). A succinct summary of the basis for this policy may be found in this Court's opinion in Hudson Valley Broadcasting Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 1, 2, 320 F.2d 723, 724 (1963), where the Court observed that:

> The Commission in 1958 became concerned that the lower-powered Class IV stations were not providing a satisfactory signal to the areas they were designed to serve. Several reasons appeared. Background electrical noise levels were increasing. Suburbs were spreading out, enlarging the size of the areas to be served. The Commission decided that the best solution to the problem of providing effective Class IV service would be to encourage all Class IV stations to increase transmitter power to the 1,000 watt maximum power permitted that class of station.

Because an increase in power by KPLT would cause electrical interference within the normally protected service area of appellant's station KTXO, as well as several other AM stations, a hearing on KPLT's application was required. Communications Act of 1934,

as amended, Section 316(a), 47 U.S.C. 316(a). Cf. Federal Communications Commission v. National Broadcasting Co., Inc. (KOA), 319 U.S. 239 (1943). At the hearing, the principal question presented was whether, as required by then Section 3.24(b) of the Commission's Rules, the need for KPLT's proposed increase in service outweighed the need for the service which would be lost through the interference caused to the other stations. The Review Board concluded that there was a greater need for such proposed increase.

In this appeal, appellant challenges the Review Board's decision granting KPLT's application, contending in substance that the Review Board erroneously found that a grant of the application would be consistent with former Section 3.24(b) of the Commission's Rules. We shall demonstrate, however, that the Review Board's finding is fully supported by the record, and, that its conclusion to grant the application was a permissible exercise of its discretion. See Atlas Broadcasting Co. v. Federal Communications Commission, 111 U.S. App. D.C. 196, 295 F.2d 183 (1961).

In concluding that the need for the service that would be gained by an increase in power by KPLT outweighed the need for the service that would be lost thereby, the Review Board found, first that (R. 213) "the proposed increase in power would bring a new daytime service to 27,115 additional persons in an area of 1,728 miles," thereby increasing the number of persons served by KPLT by about 50%. The Board also found (ibid.) that "no persons now served by KPLT would lose its service" and that "the KPLT proposal would provide a fifth

primary service to the city of Hugo, Oklahoma.

Additionally, the Review Board noted (R. 213-5) that the interference caused by KPLT's power increase would not create any "white" or "grey" areas, i.e., no persons would be left with no or only one primary service. Indeed, the record showed that a minimum of five other primary services would continue to be available to all persons losing service and that with respect to those persons losing service from station KTXO a minimum of 11 primary services would continue to be available. The Review Board also considered a prior Commission ruling in which the Commission stated that in hearings involving applications by Class IV stations for increases in power, decisional significance would be accorded to the Commission's goal of a nation-wide system of 1000-watt Class IV stations. Processing Procedure for Class IV Stations, 21 Pike & Fisher, R.R. 1600, 1603 (1961).

As this Court noted in Hudson Valley Broadcasting Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 1, 2, 320 F.2d 723, 724 (1963), the Commission in announcing this goal in 1958 "decided against a blanket waiver of conflicting rules and declared it would adjust each conflict on a case-by-case basis." However, in 1960 it partially reconsidered this position and adopted a "blanket waiver of the so-called 10 per cent rule" (ibid.) And in 1961, the Commission stated that with respect to other rules, "the improvement of service to be derived from a nationwide chain of local station power increases, will retain a position of superior decisional significance," in future hearings. Processing Procedure for Class IV

Stations, 21 Pike & Fischer, R.R. 1600, 1603 (1961).

In view of the Commission's 1961 ruling, the Review Board concluded in this case that (R. 216) "in making the determination required by Section 3.24(b) of the Rules a preference may be given to the implementation of the broad policy objective of the Commission to encourage and permit higher power for Class IV stations. When we add to this preference the other factors reflected in the record of this proceeding, we must conclude that, together, they call for a grant of KPLT's application."

In challenging the Review Board's conclusion, the appellant points out (Br. 25) that an increase in power by KPLT will result in a net loss of service affecting some 16,000 people, since a greater number of persons will lose service from other stations than will gain service from KPLT. 7/ However, the Review Board concluded that this fact in itself did not preclude the conclusion that a grant of KPLT's application would be consistent with Section 3.24(b) of the Commission's Rules. As we shall show, this conclusion was warranted in the circumstances of this case.

7/ As set forth in the Review Board's decision (R. 213-5), because of interference caused by KPLT's power increase a total of five other AM stations will no longer provide primary service in an aggregate area of 2,182.5 square miles. Since KPLT's proposed signal will not be of sufficient strength to replace the signals of the other stations that will be interfered with (although, as the Review Board noted (R. 213-4), in portions of the interference area the KPLT's service will be substituted for that of KTXO and KBOX) and since the total population in the interference area is greater than the population that will receive interference-free primary service from KPLT's power increase, the result of such increase will be a net loss in service.

Thus, the Review Board noted that of the 43,548 persons losing primary service more than half -- 26,953 -- will lose service from three other Class IV stations operating on the same channel as KPLT. The licensees of these stations did not object to a grant of KPLT's application. Moreover, all three stations presently operate with 250 watts power, and therefore they, like KPLT, are eligible to increase their power to 1000 watts, thus reducing the area of interference between them and KPLT and completely restoring the service lost as a result of KPLT's power increase.[8/] Under the terms of the grant to KPLT, the station is required to accept whatever interference will be caused by these stations going up in power. And, as appellant has noted (Br. 30), since the Review Board's decision in this case the Commission granted an application for an increase in power to 1000 watts that had been filed by one of these stations thus substantially reducing the service loss that was shown to exist

8/ The explanation for such a restoration of service is as follows: Interference between co-channel stations is caused when the 0.025 mv/m contour of one station intersects the 0.5 mv/m contour of the other, 47 CFR 73.182(v) & (w). Since an increase in power from 250 to 1000 watts by one Class IV station will extend the reach of its 0.025 mv/m contour, the intersection of that contour with the 0.5 mv/m contour of other co-channel stations will occur at points closer to such other stations than before the increase, thereby reducing the other stations' primary (interference free) service area. But if the other stations also increase power to 1000 watts, the reach of their 0.5 mv/m contours will also be extended so that the intersections of those contours with the 0.025 mv/m contour of the station first increasing power will recede to a point where all the primary service area that had been lost is regained.

at the time the record in this proceeding was closed.[9/]

In view of these considerations, the Review Board concluded, properly we believe, that (R. 215) "there is reason and authority for the proposition that interference to Class IV stations in these circumstances may be considered with less individual concern."[10/]

Appellant also argues (Br. 23-25) that the Commission's Class IV power increase policy should not have been considered in this case since there was no evidence "that denial of KPLT's application actually would adversely affect or 'frustrate the Commission's efforts to effectuate a nationwide chain of Class IV stations of 1 kw power' . . ." (Br. 25). But this argument could be made against any other individual power increase by a Class IV station. We believe it is apparent that since the Commission's goal is to achieve a nationwide chain of 1000-watt Class IV stations by encouraging "all Class IV stations to increase transmitter power," Hudson Valley Broadcasting Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 1, 2, 320 F.2d 723, 724 (1963), this goal would be frustrated to the extent the application of any station eligible for an increase in power, including KPLT's, was denied. Therefore, it clearly was appropriate for the Review Board to apply the Commission's ruling in this

9/ Appellant's argument (Br. 30-31) that the Commission's grant of that application represents a change in circumstances warranting remand is not well taken, since the grant has not "impaired the validity of the Commission's determination in this case, Southland Television Co. v. Federal Communications Commission, 105 U.S. App. D.C. 282, 284, 266 F.2d 686, 688 (1959); but on the contrary has strengthened one of the bases on which the decision rests, i.e. that the immediate loss in service can and will be overcome as other Class IV stations seek an increase in power. Therefore, a remand for consideration by the Review Board of the effect of the change on its decision herein clearly would serve no useful purpose.

10/ As the Review Board noted, the Commission had reached a similar conclusion in a prior case involving a Class IV station power increase. WSTV, Inc., 31 FCC 694 (1961).

case.

Nor is there any merit to appellant's argument (Br. 25-28) that if it was proper for the Review Board to consider the Commission's Class IV power increase policy, the Review Board nevertheless erred since it subordinated former Section 3.24(b) of the Commission's Rules to that policy in contravention of this Court's decision in the Hudson Valley case. But appellant's reliance on that case is misplaced. In Hudson Valley, the Commission had granted without hearing an application for a Class IV station increase in power which conflicted with the Commission's rule on overlap of coverage of commonly owned stations,[11/] and the Court held that a hearing was required pursuant to Section 309(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d)(2), to resolve the conflict. In this case, however, the Review Board, after hearing, found that there was no conflict between a grant of KPLT's application and any Commission rule or policy, which would require, as in the Hudson Valley case, that one be subordinated to the other. Indeed, as we have indicated above (supra, p. 12), the Review Board expressly found that a grant of KPLT's application would satisfy the requirements of former Section 3.24(b) of the Rules, since the need for the service to be gained by KPLT's power increase outweighed the need for the service that would be lost. In reaching this result, as the Board stated, (R. 258) "the policy [was] considered in applying the rule to the hearing record" in the case.

Lastly, appellant argues (Br. 28-30) that the Review Board's grant of KPLT's application was improper since it would subject 13.3%

11/ See Section 73.25 of the Commission's Rules, 47 CFR 73.25.

of the population within KTXO's normally protected service area to interference, thereby making the operation of KTXO inconsistent with the Commission's "ten percent" rule.[12/] But appellant did not present this argument below, and, therefore, it comes too late now. Communications Act, Sec. 405, 47 U.S.C. 405; Albertson v. Federal Communications Commission, 100 U.S. App. D.C. 103, 105, 243 F.2d 209, 211 (1957). The argument is in any event without merit since by its terms the Commission's "ten percent" rule applies only to broadcast applications and not to existing operations.

In sum, based upon the evidence of record showing the gains and losses that would follow a grant of KPLT's application and the Commission's ruling that "decisional significance" should be accorded to its policy of promoting Class IV power increases, the Review Board concluded that KPLT should be permitted to increase power. We do not believe that appellant has shown that the Review Board's action was arbitrary and capricious; on the contrary, we believe the Review Board's Decision was a proper exercise of its expertise.

12/ See Section 73.28(d)(3) of the Commission's Rules, 47 CFR 73.28(d)(3), which provides in pertinent part that:

> "(d) Upon showing that a need exists, a Class II, III or IV station may be assigned to a channel available for such Class, even though interference will be received within its normally protected contour, Provided:
>
> (3) The interference received does not affect more than 10 percent of the population in the proposed station's normally protected primary service area . . ."

II. THE REVIEW BOARD DID NOT IMPROPERLY IMPOSE THE BURDEN OF PROOF UPON APPELLANT.

Appellant argues (Br. 18-23) that the Review Board improperly shifted the burden of proof from KPLT to appellant when it stated in its Memorandum Opinion and Order denying reconsideration that (R. 259) "in comparing needs under Rule 73.24, the benefits which can be expected from nationwide Class IV increases in power will retain superior decisional significance unless it can be shown that the need for the service which will be lost in the event of grant overrides such considerations." Appellant's argument is wholly lacking in merit; appellant has confused the burden of proof, which remained on KPLT throughout the proceeding and which the Review Board found KPLT had met, with the burden of going forward with evidence, which, properly, was shifted to appellant once a prima facie showing had been made that a grant of KPLT's application would be in the public interest.

In its decision, the Review Board held that (R. 217) the evidence of record "lead[s] to the conclusion that the need for the KPLT proposed service has been satisfactorily shown to outweigh the need for the service which will be lost" and that "KPLT has established a prima facie case for a grant. Under such circumstances, it was incumbent on respondents [appellant] to come forward with evidence offsetting the applicant's showing." (R. 218). As we have shown (supra, pp.12-14), the Review Board properly concluded that KPLT had made a "prima facie case for a grant" since, inter alia, a grant of its application would further the Commission's policy of encouraging all Class IV stations to increase daytime power to 1000 watts and the greatest loss

of service that would result from a grant will involve other Class IV stations who are also eligible to increase power and thereby restore the service that will be lost. Therefore, the Review Board's requirement that appellant "come forward with evidence offsetting the applicant's showing" did not constitute an improper shift of the burden of proof; rather it was a proper shift of the burden of producing evidence. For it is well settled that "upon the establishment of a prima facie case the burden of evidence or the burden of going forward with the evidence shifts to the [other] party. It then becomes incumbent upon such . . . party to meet the prima facie case which has been established." Delaware Coach Co. v. Savage, 81 F. Supp. 293, 296 (D.C. Del., 1948). See also, Kortz v. Guardian Life Insurance Co. of America, 144 F.2d 676 (C.A. 10, 1944); Miller v. Kruggel,165 Kan. 435, 195 P. 2d 597 (1948); 9 Wignore on Evidence, 3d ed., Sec. 2489.

In short, the Review Board did not conclude that KPLT's application should be granted because appellant had failed to show that a grant would not be in the public interest. The Review Board merely concluded that KPLT had shown that a grant would be in the public interest and that it was incumbent upon appellant to counter KPLT's showing if it wished to avoid such grant.

CONCLUSION

For the foregoing reasons, the Review Board's decision should be affirmed.

HENRY GELLER,
General Counsel,

JOHN H. CONLIN,
Acting Associate General Counsel,

MICHAEL FINKELSTEIN,
Counsel.

Federal Communications Commission
Washington, D. C. 20554

February 15, 1965

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,944

O'CONNOR BROADCASTING CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

KPLT, INC.,
Intervenor.

Appeal from a Decision and Orders of
the Federal Communications Commission

ROBERT M. BOOTH, JR.
1100 Vermont Avenue, N.W.
Washington, D. C. 20005
Counsel for Appellant
O'CONNOR BROADCASTING CORPORATION

March 19, 1965

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REPLY BRIEF FOR APPELLANT

COUNTERSTATEMENT OF THE CASE

Appellee's counterstatement of the case is so incomplete as to contribute little to an understanding of the allocation principles involved and some of the questions presented by this appeal. Intervenor's counterstatement is so brief as to have no usefulness. Appellant

respectfully submits that the statement of the case contained in its brief is far more complete and is no more argumentative than is Appellee's counterstatement.

ARGUMENT

The arguments of the Appellee (sometimes called the Commission) are brief and consist primarily of assertions that its Review Board did not err in granting the application of the Intervenor (sometimes called KPLT). Most significant is the failure of the Appellee to attempt to answer some of Appellant's arguments.

Two of Appellee's basic arguments, when carefully examined, do not support its position but actually support Appellant's arguments that the application of KPLT must be denied.

The first argument, to which Appellee devotes much attention, is that the interference which the proposed operation of KPLT would cause to three cochannel Class IV stations is of no significance because the loss in service will be restored when those stations increase their power from 250 to 1,000 watts. (Appellee's Brief, Page 15). What Appellee overlooked, however, is that, because the three cochannel stations surround and already cause interference to the proposed operation of KPLT (R. 97), increases in power by all three stations will increase the interference to KPLT to such an extent that all areas which will gain service from the proposed operation of KPLT actually will be lost once again. *Thus, the net gain in service by KPLT will be zero.* To accomplish this zero gain in service, 16,695 persons in areas totalling 950 square miles will lose service of two adjacent channel stations, KBOX and Appellant's KTXO. Obviously, the public interest, convenience and necessity will not be served when the only result will be a loss of service.

The second argument is that the Review Board's final decision and its order denying Appellant's petition for rehearing is supported by this

Court's opinion in *Hudson Valley Broadcasting Corp. v. Federal Communications Commission,* 116 U.S. App. D.C. 1, 320 F.2d 723 (1963). As will be shown later in this argument, Appellee relied only upon portions of that opinion and failed to give effect to the most important part.

The Intervenor, in its brief, has discussed many of the same points discussed by the Appellee. Therefore, this reply will be directed primarily to Appellee's brief with only occasional references to Intervenor's brief.

I.

THE COMMISSION'S ARGUMENT THAT INTERFERENCE TO COCHANNEL STATIONS IS NOT A SIGNIFICANT CONSIDERATION BECAUSE THEY MAY INCREASE POWER IS SPECIOUS

The basic facts as they existed at the time of the hearing and the issuance of the final decision are not in dispute. Appellant and the Commission agree that the record evidence shows that the proposed increase in power of Intervenor's station, KPLT, from 250 to 1,000 watts would provide a new daytime service to 27,115 persons in an area of 1,728 square miles, and would cause objectionable interference to five existing stations and a withdrawal of service to 43,548 persons in areas totalling 2,182.5 square miles. (Appellant's Brief, Pages 4-5; Appellee's Brief, Pages 3, 4, 15).[1]

The Commission, in its brief, argues that the loss of service by 26,953 of the 43,548 persons is not of significance because the three 250 watt cochannel stations which would suffer such interference "... could also increase their power to 1,000 watts and thereby restore the service lost as a result of KPLT's power increase." (Appellee's Brief, Pages 8, 15).[2]

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[1] Although Intervenor did not show the total loss of service in its brief, it did not dispute Appellant's showing.

[2] Appellant agrees with the explanation for such a restoration of service set forth in footnote 8, page 15, of Appellee's brief.

The Commission's argument is specious and sophistical.

What the Commission fails to tell the Court is that no persons or areas would gain service from the operation of KPLT with increased power if all three cochannel stations increase their power from 250 to 1,000 watts.[3] Although no persons or areas would gain service, 16,695 persons in areas totalling 950 square miles would lose service of two adjacent channel stations, KBOX and Appellant's KTXO (R. 213-214). Thus, there would be absolutely no benefit from the proposed increase in power to support a grant of the KPLT application.[4]

---

[3] The explanation for restoration of service, set forth in footnote 8, page 15, of Appellee's Brief, is equally applicable to loss of service by the first station to increase power from 250 to 1,000 watts. If all three cochannel stations, which surround KPLT, increase their power to 1,000 watts, the last sentence of footnote 8 may be revised to read as follows:

> "But if other stations also increase power to 1,000 watts, the reach of their 0.025 mv/m contours will be extended so that the intersections of those contours with the 0.5 mv/m contour of the station first increasing power will recede to a point where all of the primary service area that had been gained is lost." (Changes underscored).

[4] The Commission, on page 11 of its brief, quotes from this Court's opinion in Hudson Valley Broadcasting Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 1, 2, 320 F.2d 723, 724 (1963), where the Court summarized some of the reasons why the Commission, in 1958, amended its rules to permit Class IV stations to seek increases in daytime power. However, as recently as February 17, 1965, in Ponce Broadcasting Corporation, 4 Pike & Fischer RR 606, the Commission, in denying an application of an existing station to increase power, stated as follows in paragraph 17, page 9:

> "The improvement of signal strength in areas now receiving primary service is irrelevant, since, if the application is denied, those areas will continue to receive a signal of sufficient strength which, under the Commission's Rules, constitutes primary service. Cf. Five Cities Broadcasting Co., Inc., 35 FCC 501, 504, 1 RR 2d 279 (1963)."

Thus, the Commission cannot now argue that the application of KPLT should be granted so as to provide a stronger signal to areas to which it already provides primary service.

II.

THE COMMISSION HAS NOT SATISFACTORILY ANSWERED APPELLANT'S CONTENTION THAT THE RECORD DOES NOT ACCURATELY SHOW THE POPULATION AND AREAS WHICH WOULD GAIN SERVICE FROM THE PROPOSED OPERATION

Appellant contended, in Part V of its Argument, on pages 30 and 31 of its brief, that the record does not accurately show the populations and areas which would gain service from the proposed operation of KPLT because, after issuance of the final decision, the Commission authorized one of the three cochannel stations which would suffer interference from KPLT's proposed operation, KBIX, to increase its power to 1,000 watts. Significantly, the Commission does not challenge the accuracy of the following statement:

> ". . . Therefore, it is obvious that the proposed operation of KPLT would suffer additional interference from KBIX, and would serve fewer people than shown in this record. Thus, the need for the proposed service will be less than shown in the record."

The Commission's answer is twofold. First, it contends that the grant has not impaired the validity of the Commission's determination in this case, and cites *Southland Television Co. v. Federal Communications Commission,* 105 U.S. App. D.C. 282, 284, 266 F.2d 686, 688 (1959). Second, the Commission argues:

> ". . . but on the contrary [the KBIX grant] has strengthened one of the bases on which the decision rests, i.e. that the immediate loss in service can and will be overcome as other Class IV stations seek an increase in power. Therefore, a remand for consideration by the Review Board of the effect of the change on its decision herein clearly would serve no useful purpose." (Appellee's Brief, Footnote 9, Page 16).

The Commission's reliance upon this Court's opinion in the *Southland* case is misplaced. Actually, that case supports Appellant's request

for remand for the taking of new evidence in the light of changed conditions. In an earlier opinion in the *Southland* case,[5] this Court remanded the case to the Commission with instructions to consider the effect of the death of a principal of the successful applicant following the final decision upon that applicant's comparative qualifications. The opinion cited by the Commission merely affirmed the Commission's action following the remand.

The grant of the KBIX application most assuredly has ". . . impaired the validity of the Commission's determination in this case." The Commission does not challenge the accuracy of Appellant's contention that the proposed operation of KPLT ". . . would serve fewer people than shown in this record . . ." because of the new interference from the 1,000 watt operation of KBIX. In addition, its accuracy has been demonstrated by the discussion in Part I of this argument. Unless and until the record accurately shows the populations and areas which would gain service from the proposed operation of KPLT, the Commission cannot possibly make the determination required by Section 73.24 of the Commission's Rules, 47 CFR §73.24, which provides, in pertinent part, as follows:

> "*Broadcast facilities; showing required.*
>
> "An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:
>
> "(a) . . .
>
> "(b) That objectionable interference will not be caused to existing stations or that, if interference will be caused, the need for the proposed service outweighs the need for the service which will be lost by reason of such interference."

For this reason alone, the decision must be set aside and the case remanded to the Commission with instructions to receive evidence bringing the record up-to-date.

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[5] The remand is referred to in Southland Television Co., 17 Pike & Fischer RR 150 d.

The Commission's second contention, that the grant of the KBIX application ". . . has strengthened one of the bases upon which the decision rests, *i.e.*, that the immediate loss in service can and will be overcome as other Class IV stations seek an increase in power . . .", ignores the fundamental fact, as discussed in Part I of this argument, that the grant of the KBIX application actually cuts two ways. At the same time it ". . . has strengthened one of the bases upon which the decision rests . . .", it has weakened another of the bases upon which the decision must rest, *i.e.*, the populations and areas which would gain service from the proposed operation of KPLT. The simple fact, as shown above, is that the "immediate" gain ". . . in service can and will be overcome as other Class IV stations seek an increase in power . . ."

The Commission's arguments fully support Appellant's basic contention that this case must be remanded to receive and consider evidence based upon the conditions as they actually exist.

III.

IN REVIEWING THE COMMISSION'S POLICY STATEMENTS CONCERNING POWER INCREASES BY CLASS IV STATIONS, BOTH APPELLEE AND INTERVENOR IGNORED THOSE RELATING TO ADJACENT CHANNEL INTERFERENCE

Both Appellee and Intervenor discuss at some length the Commission's various reports and orders involving power increases by Class IV stations[6] in support of their contentions that the policy of encouraging Class IV stations to increase daytime power to 1,000 watts overrides all other considerations, including interference to and loss of service by adjacent channel stations. (Appellee's Brief, Pages 5, 6, 11, 13; Intervenor's Brief, Pages 13, 18). Significantly, however, both have found it necessary

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[6] Report and Order, Power Limitations of Class IV Stations, 17 Pike & Fischer RR 1541 (1958); Report and Order, Applicability of 10% Rule to Class IV Applications, 20 Pike & Fischer RR 1661 (1960); Report and Order, Processing Procedure for Class IV Applications, 21 Pike & Fischer RR 1600 (1961).

to ignore the following unequivocal statements in the Commission's latest policy statement contained in the *Report and Order,* 21 Pike & Fischer RR 1600 (1961), at 1602-1603:

> "9. In administering the rule change set forth in the attached appendix, it appears unavoidable that, in some instances, a group of Class IV applications involving interlinking interference problems only, will include one or more proposals which in turn involve interference with the existing or proposed operations of other class stations operating in adjacent channels. We do not, in these situations, intend to designate all for hearing. Rather, these applications which involve only interference with other Class IV stations will be granted simultaneously subject to the condition that they accept whatever interference may be caused by the subsequent increases in power of other Class IV stations. The remaining Class IV applications, which involve substantial adjacent channel interference with other than Class IV stations, will either be returned to the processing line to await study and designation for hearing, or, if their respective positions on the processing line warrant, will be designated for hearing immediately. ***Thus it*** *behooves each Class IV applicant for power increase to 1 kilowatt, to consider carefully its proposal and to avoid objectionable interference, to other than Class IV operations, by utilization of a directional antenna system,* lest action on its application be delayed pending completion of the hearing process.
>
> "10. It is also appropriate at this time to note that our experience with Class IV applications already considered shows that interference to adjacent channel stations of other classes is, in practically all cases, no bar to their ultimate grant, since this interference approaches substantial proportions only in rare instances. In light of this experience and in order to permit increases in power for Class IV stations as expeditiously as possible, as well as to counteract the consequent backlog of applications both at the processing and hearing stage, we propose to grant without designation for hearing, those Class IV applications for increases in power that involve slight adjacent channel interference only, and it is hopeful that the demands for hearing may be eased by the expectation that in all but those cases involving substantial interference, the interference to adjacent channel stations

> will not override the benefits which can be expected from nationwide Class IV increases in power. Although as indicated, supra, adjudication after hearing must necessarily be based upon the record made in the proceeding, the improvement of service to be derived from a nationwide chain of local station power increases, will retain a position of superior decisional significance." (Emphasis supplied.)

The statements conclusively prove that the Commission never intended its 1958, 1960 and 1961 policy statements to override or constitute a waiver of its rules, other than the 10% rule, and particularly rules and considerations of adjacent channel interference.

IV.

APPELLEE URGES THE COURT TO IGNORE ITS HUDSON VALLEY OPINION

In *Hudson Valley Broadcasting Corporation v. Federal Communications Commission,* 116 U.S. App. D.C. 1, 320 F.2d 723 (1963), an appeal from a grant without hearing of an application of a Class IV station to increase power in a manner which might contravene the Commission's multiple ownership rule, the Commission urged that its policy statements concerning increases in power by Class IV stations[7] fully supported the grant. The Court rejected that contention in reversing the Commission:

> "The Class IV power increase policy, in contrast, has always been subordinated to other Commission policies. As discussed *supra,* the Commission initially rejected a proposal for blanket waiver of conflicting rules. The Commission utilized a full rule-making process before waiving the so-called 10 per cent rule. *Where interference to other classes of stations was a possibility, directional antennas were required as a condition to expedited handling.* [31]
>
> [31] Processing Procedure for Class IV Stations, supra, Note 9, at 1602-1603." (Italics supplied.)

[7] Report and Order, Power Limitation of Class IV Stations, 17 Pike & Fischer RR 1541 (1958); Report and Order, Amendment of 10 Per Cent Rule, 20 Pike & Fischer RR 1661 (1960); and Report and Order, Processing Procedure for Class IV Stations, 21 Pike & Fischer RR 1600 (1961).

The Commission, on page 13 of its brief, essentially repeats the argument it made in *Hudson Valley* which this Court rejected. The Commission first states that, in 1958, it "'decided against a blanket waiver of conflicting rules and declared it would adjust each conflict on a case-by-case basis'." But then the Commission continues:

> "However, in 1960 it partially reconsidered this position and adopted a 'blanket waiver of the so-called 10 per cent rule' (*ibid.*). And in 1961, the Commission stated that with respect to other rules, 'the improvement of service to be derived from a nationwide chain of local station power increases, will retain a position of decisional significance,' in future hearings. *Processing Procedure for Class IV Stations*, 21 Pike & Fischer RR 1600,1603 (1961)."

The Commission, on page 17 of its brief, argues that Appellant's reliance upon *Hudson Valley* is misplaced because, in this case, the ". . . Review Board, after hearing, found that there was no conflict between a grant of KPLT's application and any Commission rule or policy, which would require, as in the *Hudson Valley* case, that one be subordinated to the other" (Appellee's Brief, Page 17).

As shown on page 27 of Appellant's Brief, the Commission most certainly gave "decisional significance" to its policy, when its Review Board stated:

> "Thus, even insofar as respondent's stations are concerned, in making the determination required by Section 3.24(b) [now 73.24(b)] of the Rules, a *preference may be given* to the implementation of the broad policy objective of the Commission to encourage and permit higher power for Class IV stations" (R. 216).

This clear-cut statement conclusively proves that the rule was subordinated to the policy.

The Commission's answer is to refer to the following self-serving declaration of the Review Board, in its order denying Appellant's petition

for rehearing, that ". . . the policy [was] considered in applying the rule to the hearing record" (R. 258).

Whether the subordination of a long-established rule to a recently established policy occurred after a hearing or in making a grant without a hearing is immaterial. It is the subordination which is controlling, not when or how it was done.

It is respectfully submitted that this Court, in *Hudson Valley*, specifically rejected the Commission's contention that its Class IV power increase policy would have such "decisional significance" in hearings that significant effect would not be given to other applicable rules, such as the multiple ownership rule and the interference to other stations rule, Section 73.24. The Court is respectfully requested to give full force and effect to its *Hudson Valley* opinion and reverse and remand this case to the Commission.

V.

THE COMMISSION HAS FAILED TO ANSWER APPELLANT'S ARGUMENT THAT THE RECORD CONTAINS NO EVIDENCE THAT A GRANT OF KPLT'S APPLICATION IS NECESSARY TO IMPLEMENT THE NATIONWIDE POWER INCREASE POLICY

The Review Board, in its final decision, gave great and controlling weight to the proposition that ". . . the improvement of service to be derived from a nationwide chain of local power increases, will retain a position of decisional significance" (R. 216,. and, in denying Appellant's petition for rehearing, stated:

> "Thus, in comparing needs under Rule 73.24, the benefit which can be expected from nationwide Class IV increases in power will retain superior decisional significance unless it can be shown that the need for the service which will be lost in the event of grant overrides such considerations" (R. 259).

Appellant quoted this statement on page 24 of its brief and then argued that the record must contain evidence which would prove either that a grant of KPLT's application is necessary to implement the Class IV power increase policy or that a denial of the application would ". . . frustrate the Commission's efforts to effectuate a nationwide chain of Class IV stations of 1 kw power" (R. 216). Appellant argued that the record contains no such evidence and, therefore, the policy considerations cannot override the interference considerations and the provisions of Section 73.24 of the Commission's Rules (Appellant's Brief, Pages 24-25).

Significantly, neither the Commission nor the Intervenor challenged the accuracy of Appellant's contention that the record contains no such evidence. Instead, the Commission merely stated that ". . . This argument could be made against any other individual power increase by a Class IV station," and then cited, once again, *Hudson Valley, supra* (Appellee's Brief, Page 16).

If the Commission's position is correct, the hearing processes might as well be abandoned!

VI.

THE APPELLEE AND INTERVENOR HAVE FAILED TO DEMONSTRATE THAT INTERVENOR'S EVIDENCE ESTABLISHED A PRIMA FACIE CASE

One of the questions presented by this appeal is:

> "Whether the Commission's conclusion that the applicant had made a prima facie case for the grant of its application and that the burden was upon the Applicant to come forward with offsetting evidence was erroneous."

The first part of Appellant's argument, pages 18 to 23, inclusive, was devoted to this question. Appellant contended that the Commission erroneously shifted both the burden of proof and the burden of proceeding with the introduction of evidence upon Appellant.

Both the Commission and the Intervenor discuss at some length the fundamental principle that, when the evidence establishes a *prima facie* case the burden of proceeding with the introduction of the evidence shifts to the other party. However, not one of the authorities cited by the Commission support the proposition that presentation of a *prima facie* case shifts the burden of proof to the other party.

Appellant relies upon the argument in its brief that the Commission unlawfully shifted the burden of proof to Appellant. The question here is whether KPLT's evidence established a *prima facie* case so that the burden of proceeding with introduction of the evidence shifted to Appellant.

A review of numerous authorities has failed to disclose any clear-cut test for determining whether a *prima facie* showing has been made. In IX *Wigmore On Evidence,* 3rd Edition, Section 2494, the following appears on page 296:

> "(II) The question is thus presented, in determining the sufficiency of evidence to go to the jury, whether there are any detailed *tests to control or to guide the judge* in his ruling.
>
> "The ruling will, in truth, depend entirely on the nature of the evidence offered in the case in hand; and it is seldom possible that a ruling can serve as a precedent."

On page 299, the following appears:

> "Perhaps the best statement of the test is this: '[The propositon] cannot merely be, Is there evidence? . . . The proposition seems to me to be this: Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?' [footnote omitted].
>
> "In the statutes creating *administrative boards*, and providing that their findings of fact 'if supported by *substantial* evidence' shall be conclusive, the tendency seems to be to assimilate this test to that already in vogue for jury trials as to the sufficiency of evidence to go to the jury. [footnote omitted]."

It is respectfully submitted that the evidence presented by KPLT did not establish a *prima facie* case, both because the evidence showed that more areas and persons would lose service than would gain service, and because KPLT presented absolutely no evidence to show a *need* for the proposed service. The only support for the contention that a *prima facie* case was established is the Commission's argument that its policy provides that increases in power of Class IV stations will retain "superior decisional significance."

Appellant respectfully submits that the Commission erroneously based its grant of KPLT's application, in part, upon the fact that Appellant did not offer evidence and did not affirmatively prove a special need for the service which it and other stations would lose.

CONCLUSION

Only the most significant portions of and omissions from the briefs of Appellee and Intervenor have been discussed in this reply. When consideration is given to the entire record, the briefs of the parties, and the authorities cited, the conclusion can only be that the Decision of the Commission should be set aside and remanded to the Commission.

Respectfully submitted,

ROBERT M. BOOTH, JR.
1100 Vermont Avenue, N. W.
Washington, D. C. 20005
Counsel for Appellant
O'CONNOR BROADCASTING CORPORATION

March 19, 1965

BRIEF FOR INTERVENOR

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,944

O'CONNOR BROADCASTING CORPORATION,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

KPLT, INC.,
Intervenor

Appeal from a Decision and Order
of the Federal Communications Commission

B. AUSTIN NEWTON, JR.
RAY R. PAUL
VINCENT J. CURTIS, JR.
815 - 15th Street, N. W.
Washington, D. C. 20005

Counsel for Intervenor
KPLT, Inc.

February 15, 1965

QUESTIONS PRESENTED

The statement of Questions Presented in Appellant's Brief are in accord with the Prehearing Stipulation and Order, with the exception that Appellant has failed to note that Appellee and Intervenor have reserved the right to argue that Question No. 5 is not properly before this Court.

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COUNTERSTATEMENT OF THE CASE

Although Appellant's Statement of the Case is substantially correct, due to certain inferences made therein, Intervenor, KPLT, Inc. (hereinafter sometimes referred to as KPLT), respectfully submits this counterstatement.

KPLT, applicant in the instant proceeding, is the licensee of Station KPLT, Paris, Texas (1490 kc, 250 w, at Class IV), and is seeking authorization to increase daytime power to 1 kilowatt.

In accord with the Commission's policy of encouraging and permitting 250 w Class IV stations to increase power to 1 kw, KPLT tendered its application for filing with the Commission on February 12, 1962. (R. 1-39). Pursuant to Section 1.580 (formerly 1.359) of the Commission's Rules, 47 CFR Section 1.580, publication of a Public Notice relating to the filing of the application was made in The Paris News and the Notice was broadcast over the facilities of the station. (R. 40-43). In addition, all notices pursuant to Section 1.571, 47 CFR Section 1.571, were given by the Commission and published in the Federal Register.

By Memorandum Opinion and Order released April 15, 1963, the Commission designated KPLT's application for Hearing. (R. 62-63). The hearing was held on June 25, 1963 and the record closed on that date. In an Initial Decision, released July 25, 1963, the Hearing Examiner recommended a grant of the application. (R. 153-161). Exceptions were filed by Radio Station KBOX, licensee of station KBOX, Dallas, Texas, (R. 190-199), and Appellant (R. 164-177), both respondents in this proceeding; and by Chief,

Broadcast Bureau (R. 178-183). Oral argument was held before a panel of the Review Board on November 26, 1963. The Review Board released a Decision on January 10, 1964, granting the application. (R. 212-220). Appellant filed a Petition for Rehearing on February 10, 1964, (R. 221-229) and the Review Board by Memorandum Opinion and Order, released May 11, 1964, denied Appellant's petition (R. 255-259). On June 10, 1964, Appellant filed an Application for Review with the Commission (R. 260 267). By Order released September 8, 1964, the Commission denied Appellant's application for review (R. 290).

For the reasons set forth infra, KPLT respectfully submits that the Commission's Decision of September 8, 1963, should be affirmed.

STATUTES AND RULES INVOLVED

1. Section 73.24 of the Commission's Rules, 47 CFR Section 73.24, provides as follows:

> "An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:
>
> * * *
>
> (b) That objectionable interference will not be caused to existing stations or that, if interference will be caused, the need for the proposed service outweighs the need for the service which will be lost by reason of such interference."

2. Section 73.28 (d)(3) of the Commission's Rules, 47 CFR Section 73.28 (d)(3) provides as follows:

> "(3) The interference received does not affect more than 10 per cent of the population in the proposed station's normally protected primary service area."

3. Section 1.254 of the Commission's Rules, 47 CFR Section 1.254, provides as follows:

> "Any hearing upon an application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof, upon all such issues shall be upon the applicant except as other wise provided in the order of designation."

4. Section 1.229 of the Commission's Rules, 47 CFR Section 1.229, provides as follows:

> "(a) A motion to enlarge, change or delete the issues may be filed by any party to a hearing.
>
> "(b) Such motions must be filed with the Commission not later than 15 days after the issues in the hearing have first been published in the FEDERAL REGISTER. Any person desiring to file a motion to enlarge, change or delete the issues after the expiration of such 15 days must set forth the reason why it was not possible to file the petition within the proscribed 15 days. Unless good cause is shown for delay in filing, the motion will not be granted."

STATEMENT OF POINTS

1. Appellant's collateral attack on the Commission's 1962 partial freeze order must fail as being untimely and without merit.

2. The Commission's grant of KPLT's application was based on the record established at hearing and was in accord with the Commission's Rules and general rules of procedure.

3. A class IV station seeking to increase power to one kilowatt is entitled to presume that the Commission's nationwide policy toward such increases is applicable to its proposal.

4. In granting KPLT's applications, the Commission did not allow its policy of fostering Class IV power increase to override the hearing record or the Commission's Rules.

5. The rationale underlying the Commission's "10% Rule" cannot be applied to interference caused to existing stations.

6. The subsequent grant of power increase to KBIX was within the contemplation of the Commission's decision in the instant proceeding.

SUMMARY OF ARGUMENT

Initially, KPLT respectfully submits that Appellant, in its statement of the case, raises a collateral attack on the Commission's 1962 partial freeze order (23 RR 1545) and the Review Board's refusal to grant Appellant authority to apply for an increase in power. Such claims must fail as being untimely and without merit.

In its Report and Order establishing the 1962 freeze, the Commission noted that the matters related thereto were matters of practice and procedure, not substantive matters, and did not require prior notice. This Court, in Kessler (WBXM Broadcasting Co.) v. Federal Communications Commission, 117 US App D. C. 130, 139, 326 F2d 673, 682 (1963), affirmed the Commission's position.

In addition, the Review Board, in refusing to allow Appellant's alternative request to increase power, clearly noted that the request must fail on the basis that it was untimely. (R. 258).

The Commission's decision in the instant proceeding was based upon the record established at hearing in light of the Commission's policy to encourage and permit Class IV stations to increase power to 1 kw, and was in accord with the Commission's Rules and general rules of procedure.

Based on the showing made by the applicant (KPLT), in light of the Commission's policy toward Class IV power increases, the Review Board determined that KPLT had established a prima facie case for a grant

of its application. In other words, the Board determined, in accord with Section 73.24(b) [formerly 3.24(b)] of the Commission's Rules, that "the KPLT proposed service has been satisfactorily shown to outweigh the need for the service which would be lost by reason of all the interference which would be received from the KPLT proposal." (R. 217).

Having determined that KPLT had established a prima facie case for a grant of its application, the Commission then turned to Appellant for evidence to offset this showing. No such showing forthcoming, the Commission granted KPLT's application. To do otherwise would have resulted in a decision not based on the record.

It is the established policy of the Commission that evidence as to program service rendered by the stations whose service would be lost is not within the scope of the issues in an interference case. It was incumbent upon Appellant to make a timely motion to enlarge issues in accord with Section 1.229 of the Commission's Rules, 47 CFR Section 1.229, therefore, if it desired to have the Commission consider its program service which would be lost due to the instant proposal. Boarder Broadcasters, Inc., 13 RR 463 (1956).

This appellant failed to do. In fact, Appellant decided not to proffer any contrary evidence to offset that offered by KPLT. When the Review Board, therefore, determined that KPLT had established a prima facie case, it was left with no choice but to grant the application.

In considering the Commission's policy to encourage and permit Class IV power increases, the Board, citing Iowa Great Lakes Broadcasting Co., (KICD), 32 FCC 907, 22 RR 652a (1962), noted that a Class IV licensee seeking to increase power to 1 kw was entitled to presume that the above policy considerations are applicable to his proposal. (R. 257). In light of such presumption, therefore, it was not necessary for the applicant to make any showing as to the manner in which a denial of its application would frustrate the Commission's nationwide Class IV policy.

In granting KPLT's application, the Commission did not allow its policy of fostering Class IV power increases to override the hearing record or the Commission's Rules. Rather, the Board carefully noted that (1) the interference areas envolving the Class IV stations are provided with primary service of 0.5 mv/m or better from five to six other stations; (2) that the interference to these co-channel Class IV stations will be equalized in the event that they themselves are granted authority to raise power; (3) that no person now served by KPLT would lose its service; (4) that a new daytime service would be provided to 27,115 additional persons in an area of 1,728 square miles; (5) that there would be a net gain over losses to the adjacent channel stations of 10,520 persons within 779 square miles; (6) that these interference areas range from 25 to 49 miles from the sites of the adjacent stations; (7) that in portions of said interference areas, the service proposed by KPLT would be substituted for that of the adjacent stations; and (8) that all of the interference areas of the adjacent stations receive primary service

(0.5 mv/m or greater) from at least 11 to 16 other stations. (R. 215-216).

The Review Board, therefore, concluded that, in light of the showing made by KPLT:

> "that KPLT's proposed service has been satisfactorily shown to outweigh the need for the service which would be lost by reason of all the interference which would be received from the KPLT proposal." (R. 217).

Contrary to the claim by Appellant, KPLT respectfully submits that the rationale of the Commission's "10% Rule", Section 73.28 (d)(3), 47 CFR Section 73.28 (d)(3), cannot be used in determining the effect of interference caused to the existing station under Section 73.24 (b), 47 CFR Section 73.24 (b). This claim has previously been rejected by the Commission as being inconsistent with the Commission's policy. International Radio, Inc., 1 RR 2d 701 (1964): Hawkeye Broadcasting, Inc., 24 RR 558 (1963); WFYC, Inc., 25 RR 307 (1963).

Finally, it is evident from the record that the Commission's grant of the instant proceeding clearly contemplated subsequent power increases of other Class IV stations. As the Board stated:

> "The Class IV stations involved in the instant proceeding have not objected to a grant, nor have they attempted to intervene herein. Moreover, the impact of a grant of such Class IV stations is substantially diminished by the first condition attached to the grant herein." (R. 215-216). Emphasis added.

In view of the foregoing, KPLT respectfully submits that the decision of the Commission in granting KPLT's application should be affirmed.

ARGUMENT

I APPELLANT'S COLLATERAL ATTACK ON THE COMMISSION'S 1962 PARTIAL FREEZE ORDER MUST FAIL AS BEING UNTIMELY AND WITHOUT MERIT.

In its Statement of the Case, Appellant raises a collateral attack on the Commission's 1962 partial freeze order (Report and Order, 23 RR 1545) and the Review Board's refusal to grant Appellant its alternative request to file an application to increase power (R. 258). KPLT respectfully submits that Appellant's claim must fail as being untimely and without merit.

Appellant argues:

> "However, before Appellant was able to complete preparation of an application to increase the power of KTXO to 1 kw, the Commission, on May 10, 1962, without prior announcement, imposed a freeze upon acceptance of most standard broadcast applications. Report and Order, 23 RR 1545. As a result, Appellant was foreclosed from filing an application to increase the power of KTXO to 1 kw which could be considered concurrently with KPLT's application." (Appellant's Brief, p. 3). (Emphasis added.)

Appellant further argues:

> "In addition, the Review Board denied Appellant's request for waiver of the 1962 freeze which made it impossible for Appellant to file an application to increase the power of KTXO so as to largely neutralize the adverse effect of a grant of KPLT's application (R. 258)." (Appellant's Brief, p. 9).

In its Report and Order establishing the 1962 freeze, the Commission noted that:

> "Since the interim procedures set forth in the appendix hereto relate to matters of practice and procedure

> before the Commission, proposed rule making in accordance with the provisions of Section 4 of the Administrative Procedure Act is not required, Authority for the adoption of the interim procedures is contained in Sections 4 (i) and 303 (r) of the Communications Act of 1934, as amended." 23 RR 1545, 1548.

In affirming the Commission's action, this Court stated:

> "In the circumstances we think that the temporary freeze on the acceptance of applications was correctly viewed by the Commission as a matter of procedure and practice before it and that it was not a substantive rule, requiring the advance notice and public participation specified by Section 4 of the Administrative Procedure Act." Kessler (WBXM Broadcasting Co. v. Federal Communications Commission, 117 US App D. C. 130, 139, 326 F 2d 673, 682 (1963).

Also, the fact remains that from February 12, 1962 (date KPLT filed its application) to May 10, 1962 (date of partial freeze), a period of almost three full months, Appellant failed to file a counter application. In addition, it was not until January 7, 1963 that the Commission gave public notice that KPLT's application was ready and available for processing and that the "cut-off" date for filing conflicting applications was set for February 11, 1963 (FCC 63-22). Nevertheless, Appellant failed once again to file any such conflicting application.

In light of this Court's pronouncement in Kessler, supra at 144-145, it would certainly appear that Appellant was either lax in not filing such conflicting application demonstrating that the two applications were mutually exclusive, or, which is more probable, determined to attempt to prevent KPLT's application from being granted rather than file its own conflicting

application. Notwithstanding the above, the Review Board's determination not to allow Appellant's alternative request to permit Appellant to file for a power increase on the grounds that such request was untimely, being made for the first time in Appellant's Petition for Rehearing filed February 10, 1964, (R. 221-229), remains correct. (R. 258).

As the Board stated:

> "In the alternative, KTXO requests that the Review Board append another condition to its grant of the KPLT application by which KPLT shall accept such interference as may result from an increase in power to 1 kilowatt by KTXO. Section 1.592 of the Rules dealing with conditional grants applies, by its terms, only with regard to applications which are mutually exclusive. Since an application for an increase in power has not been timely filed by KTXO, the instant application of KPLT cannot be considered to be mutually exclusive therewith." (R. 258) Emphasis added.

In light of the above, Appellant's collateral attack on the Commission's 1962 partial freeze order and the Review Board's denial of Appellant's alternative request for authority to apply for an increase in power must fail as being untimely and without merit.

II THE COMMISSION'S GRANT OF KPLT'S APPLICATION WAS BASED ON THE RECORD ESTABLISHED AT HEARING AND WAS IN ACCORD WITH THE COMMISSION'S RULES AND GENERAL RULES OF PROCEDURE.

Appellant, in its first Argument, claims that the Commission erred by shifting the burden of proof from the Applicant (KPLT) to the Appellant in controvention of Section 73.24 (formerly Section 3.24) and Section 1.254 (formerly Section 1.140(b)) of the Commission's Rules. This allegation is based on the contention (1) that the order designating KPLT's application for hearing limited the issues exclusively to engineering data; (2) that the Appellant decided not to present evidence to offset the evidence proffered by KPLT; (3) that the Federal Communications Commission either ignored or paid little heed to the record of the hearing; and (4) that the Federal Communications Commission, giving undue significance to the Commission's policy of encouraging power increases of existing Class IV stations (Report and Order, 21 RR 1600 (1961)), attempted to shift the burden of proof from the Applicant to the Appellant. KPLT respectfully submits that the Record clearly demonstrates that the Appellant's claim is erroneous.

It is true, as the Appellant states, that the order designating KPLT's application for hearing did concern itself solely with engineering data (R. 62-63). Equally true, however, is the Commission's established policy that evidence as to program service rendered by the stations whose service would be lost is not within the scope of the issues in an interference case and such stations cannot object to failure to consider such evidence

where they made no motion to enlarge issues. Border Broadcasters, Inc., 13 RR 463 (1956). It is evident, therefore, that it is incumbent upon an existing station, if it wishes the Commission to consider, in an interference case, its program service which will be lost due to interference by an applicant, to make a timely motion to enlarge issues in accord with Section 1.229 of the Commission's Rules, 47 CFR Section 1.229.

Appellant, however, did not so move the Commission. In fact, Appellant decided not to proffer any contrary evidence to offset that offered by KPLT.

Contrary to Appellant's contention, KPLT respectfully submits that the Commission has clearly based its grant of KPLT's application on the Record. As the Review Board stated:

> "Thus, even insofar as respondent's stations are concerned, in making the determination required by Section 3.24 (b) [now 73.24 (b)] of the Rules a preference may be given to the implimentation of the broad policy objective of the Commission to encourage and permit higher power for Class IV stations. When we add to this preference the other factors reflected in the record of this proceeding, we must conclude that, together, they call for a grant of KPLT's application. These additional factors include the facts that no person now served by KPLT would lose its service; that a new daytime service would be provided to 27,115 additional persons in an area of 1,728 square miles; that there would be a net gain over losses to respondents' stations of 10,520 persons within 779 square miles; that the interference areas range from 25 to 49 miles from the sites of respondents' stations; that in portions of said interference areas, the service proposed by KPLT would be substituted for that of the respondents; and that all of the interference areas receive primary

> service (0.5 mv/m or greater) from at least 11 to 16 other stations. In our view, the above factors clearly call for the conclusion that the need for the proposed service outweighs the need for the service which will be lost." (R. 216). Emphasis added.

With regard to the co-channel Class IV stations involved (KVWC, Vernon, Texas; KGKB, Tyler, Texas; and KBIX, Muskogee, Oklahoma), the Review Board noted that the interference areas involving these stations are provided with primary service of 0.5 mv/m or better from five to six other stations (R. 215-216). In addition, the interference to the co-channel Class IV stations will be equalized in the event that they themselves are granted authority to raise power. 1/

Finally, as the Review Board stated:

> "As we have indicated above, KPLT has established a prima facie case for a grant. Under such circumstances, it was incumbent on respondents to come forward with evidence offsetting the applicants showing. They did not do so. Presumably, respondents' respective programming services meet no special needs of the populations in the interference areas for they do not seek enlargement of the issues to permit such showing." Citing Regional Radio Service, 23 RR 599 (1962). (R. 218). Emphasis added. 2/

1/ The first condition to KPLT's grant reads as follows:

> "Permittee shall accept such interference as may be imposed by other existing 250 watt Class IV stations in the event that they are subsequently authorized to increase power to 1000 watts." (R. 218).

2/ See also Iowa Great Lakes Broadcasting Company, 22 RR 645 (1961); Radio Ashald Inc., (WNCD), 35 FCC 645 (1963); WSTV, Inc. 21 RR 575 (1961).

A review of the facts of record, therefore, indicates (1) that in interference cases, the Commission's policy is not to consider the program service of existing stations which will be lost due to interference unless the existing station timely moves the Commission to enlarge issues; (2) that the instant proceeding was such an interference case and that the Appellant failed to seek enlargement of the issues; (3) that the Appellant failed to offer any contrary evidence, engineering or otherwise, to offset that filed by the Applicant; (4) that the grant of KPLT's application by the Commission was based on the established facts of the hearing record together with the Commission's policy to foster and encourage Class IV power increases (R. 216); (5) that once it was determined that KPLT had established a prima facie case for a grant, it was incumbent upon the Appellant, in accord with well established rules of procedure, to come forward to offset KPLT's showing (R. 218); and (6) that Appellant having failed to come forward with any such evidence it left the Commission no choice but to grant KPLT's application. To do otherwise would have resulted in a decision not based upon the record.

In its clearest form, therefore, the record shows that the Commission determined that KPLT had established a prima facie case for a grant of its application. That is, the Commission determined that based on the record at hearing "the need for the KPLT proposed service has been satisfactorily shown to outweigh the need for the service which would be lost by reason of all the interference which would be received from the KPLT

proposals." (R. 217).[3/] Having determined that KPLT had established a prima facie case for a grant of its application, the Commission then turned to Appellant for evidence to offset this showing. No such evidence forthcoming, the Commission granted KPLT's application.

In essence, this proceeding comes down to a simple general rule of procedure. KPLT having established a prima facie case, it was incumbent upon Appellant to offset this showing. This Appellant failed to do. The Commission, therefore, based on the record at hearing granted KPLT's application.

In view of the foregoing, KPLT respectfully submits that the Commission did not shift the burden of proof in controvention of Sections 73.24 and 1.254 of the Commission's Rules but rather based its decision on the record established at hearing in accord with the Commission's Rules and the general rules of procedure. The Commission's decision, therefore, should be affirmed.

3/ Appellant's claim that the Commission attempted to shift the burden of proof to Appellant is based on Section 3.24 of the Commission's Rules as in effect at the time of hearing. Section 3.24 reads in pertinent part:

> "An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:
>
> * * *
>
> "(b) That objectionable interference will not be caused to existing stations or that, if interference will be caused, the need for the proposed service outweighs the need for the service which will be lost by reason of such interference." (Emphasis added.)

III A CLASS IV STATION SEEKING TO INCREASE POWER TO ONE KILOWATT IS ENTITLED TO PRESUME THAT THE COMMISSION'S NATIONWIDE POLICY TOWARD SUCH INCREASES IS APPLICABLE TO ITS PROPOSAL

The crux of Appellant's Argument II is that KPLT has failed to demonstrate that a denial of its application actually would adversely frustrate the Commission's efforts to effectuate a nationwide chain of Class IV stations of 1 kw power[4/] and, therefore, no decisional significance could be given to this policy in determining whether KPLT's application should be granted.

Appellant's argument is not a new one and has been previously answered by the Review Board. As the Review Board stated:

> "This argument was answered in the Decision [R. 212-220] at paragraph 11, wherein the Board states: 'As the Commission indicated in Iowa Great Lakes Broadcasting Co., (KICD), 32 FCC 907, 22 RR 652 a (1962), a Class IV licensee seeking to increase power to 1 kw is entitled to presume that the above policy considerations are applicable to his proposal.'" (R. 257). Emphasis added.

In addition, as has been previously noted, the Commission's determination in granting KPLT's application was based on the evidence established at hearing together with the Commission's policy toward Class IV power increases. (R. 216).

4/ See Power Limitations of Class IV Stations, 17 RR 1541 (1958); Report and Order, 20 RR 1661 (1960); and Report and Order, 21 RR 1600 (1961).

IV IN GRANTING KPLT'S APPLICATION, THE COMMISSION DID NOT ALLOW ITS POLICY OF FOSTERING CLASS IV POWER INCREASES TO OVERRIDE THE HEARING RECORD OR THE COMMISSION'S RULES.

In its Argument III, Appellant claims that although the Commission paid lip service to the principle that a policy cannot override a rule, the Commission actually based its decision solely upon its Class IV power increase policy. As noted above, such claim is without merit.

With regard to the co-channel Class IV stations, the Review Board noted that the interference areas involving these stations are provided with primary service of 0.5 mv/m or better from five to six other stations. In addition, the interference to the co-channel Class IV stations will be equalized in the event that they themselves are granted authority to raise power. (R. 215-216). The Board went on to state that:

> "While the provisions of Section 3.24 (b) of the Rules, which require that 'satisfactory showing' be made that the 'need for the proposed service outweighs the need for the service which will be lost by reason of such interference' must be applied to all interference to be caused by a proposal there is reason and authority for the proposition that interference to Class IV stations in these circumstances may be considered with less individual concern. Iowa Great Lakes Broadcasting Co. (KICD), 31 FCC 905, 22 RR 645 (1961), WSTV, Inc., 31 FCC 694, 21 RR 575 (1961). The Class IV stations involved in the instant proceeding have not objected to a grant, nor have they attempted to intervene herein. Moreover, the impact of a grant of such Class IV stations is substantially diminished by the first condition attached to the grant herein." (R. 215). Emphasis added.

In WSTV, Inc., cited by the Board above, the Commission determined that its policy toward power increases for Class IV stations warranted a grant for such increases, even though interference to existing stations (principally Class IV stations operating with 250 w power) would result in a net decrease in the number of persons receiving service, where the proposed interference areas receive numerous services and the stations which would receive the major share of the interference are Class IV stations which had not yet applied for a power increase and which did not oppose the grants in question.

In the instant proceeding, approximately more than two-thirds (2/3) of the interference involved will be to Class IV stations operating with 250 w power (R. 215); and the interference areas of the Class IV stations receive service from at least five to six other stations, while the interference areas of the adjacent channel stations receive service from at least eleven to sixteen other stations. As in WSTV, Inc., supra., the stations which would receive the major share of interference are Class IV stations which did not oppose the grant.

The only difference between WSTV, Inc. and the instant proceeding is one which is favorable to the applicant (KPLT). Whereas in WSTV, Inc. none of the Class IV stations had applied for power increase, in the instant case, Class IV station KBIX, Muskogee, Oklahoma, since the grant of KPLT's application, has been granted a power increase to 1 kw (FCC File No. BP-15844). Thus the interference to this Class IV station has been equalized as contemplated by the Commission's policy and the instant decision (R. 216).

As to the adjacent channel stations, the Review Board stated:

"Thus, even insofar as respondent's stations are concerned, in making the determination required by Section 3.24 (b) [now 73.24 (b)] of the Rules a preference may be given to the implimentation of the broad policy objective of the Commission to encourage and permit higher power for Class IV stations. When we add to this preference the other factors reflected in the record of this proceeding, we must conclude that, together, they call for a grant of KPLT's application. These additional factors include the facts that no person now served by KPLT would lose its service; that a new daytime service would be provided to 27,115 additional persons in an area of 1,728 square miles; that there would be a net gain over losses to respondents' stations of 10,520 persons within 779 square miles; that the interference areas range from 25 to 49 miles from the sites of respondents' stations; that in portions of said interference areas, the service proposed by KPLT would be substituted for that of the respondents; and that all of the interference areas receive primary service (0.5 mv/m or greater) from at least 11 to 16 other stations. In our view, the above factors clearly call for the conclusion that the need for the proposed service outweighs the need for the service which will be lost." (R. 216). Emphasis added.

Finally the Board went on to note that:

> "Even if the interference to Class IV stations were to be considered with that of other classes in this instance, the fact that a net curtailment of coverage would result is not, in and of itself, a disqualifying consideration. See WSTV, Inc., supra, where an application by a Class IV station to increase power to 1 kw was granted despite a net loss in service. Here, as in WSTV, Inc., no white or gray areas would result from a grant. 5/ Accordingly, these considerations, added to those enumerated above, lead to the conclusion that the need for the KPLT proposed service had been satisfactorily shown to outweigh the

5/ A white area is an area where, due to interference, no broadcast service is received. A gray area is an area where, due to interference only one broadcast service is received.

> need for the service which will be lost by reason of all the interference which would be received from the KPLT proposal." (R. 216-217). Emphasis added.

It is evident from the record that the Commission's grant of KPLT's application "was based on the showing which the applicant presented, considered in the light of the Commission's policy favoring increases by Class IV stations." (R. 217). In other words, the policy did not override the hearing record or a Commission Rule; but rather the policy has been considered in applying the rule to the hearing record.

V THE RATIONALE UNDERLYING THE COMMISSION'S "10% RULE" CANNOT BE APPLIED TO INTERFERENCE CAUSED TO EXISTING STATIONS.

Appellant claims in Argument IV that the rationale of the Commission's "10% Rule", Section 73.28 (d)(3), 47 CFR Section 73.28 (d)(3), should be used in determining the effect of interference to existing stations under Section 73.24 (b), 47 CFR Section 73.24 (b). Such claim is clearly without merit.

Under the Commission's Rules, interference to an existing station from a proposed new station or increase in the facilities of an existing station is considered under Section 73.24 which reads in pertinent part as follows:

> "An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:
>
> * * *
>
> "(b) That objectionable interference will not be caused to existing stations or that, if interference will be caused, the need for the proposed service outweighs the need for the service which will be lost by reason of such interference."

On the other hand, interference which will be received by the proposed station or proposed increase is governed by Section 73.28 (d)(3) of the Commission's Rules which reads in pertinent part as follows:

> "(3) The interference received does not affect more than 19 percent of the population in the

> proposed station's normally protected primary service area." 6/

There are, therefore, two separate rules and two separate rationales with regard to interference to the existing station and the proposed facility.

This has not been the first time that the Commission has been faced with the proposal that the rationale of the "10% Rule" should be used in considering interference to an existing station under Section 73.24(b). In previously rejecting this argument, the Commission has stated:

> "KUBA also contends that in a Notice of Proposed Rule Making in Docket No. 15084 (FCC 63-468) and in the Report and Order In the Matter of Interim Criteria to Govern Acceptance of Standard Broadcast Applications, FCC 62-516, 23 RR 1545 (1962), the Commission indicated that it is important to preserve the service areas of existing stations and that consideration of new applications will reflect a desire to avoid unnecessary aggravation of problems. A similar argument was advanced before the Review Board in both Hawkeye Broadcasting, Inc. [34 FCC 855, 24 RR 558 (1963)] and WFYC, Inc., 34 FCC 645, 25 RR 307 (1963). In both cases the Review Board pointed out that the Commission's statements did not establish any new standards or rules and that the standards previously applied by the Commission should continue to be applied until new rules or standards are promulgated." International Radio, Inc., 1 RR 2d 701, 705 (1964). Emphasis added.

In International Radio, Inc., supra, Respondent KUBA put forth the same argument that Appellant avers in the instant proceeding. The Commission pointed out, however, that the term "inefficient" as applied under

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6/ Existing Class IV stations, such as KPLT, seeking increase in power are specifically exempted from this Rule. Such exemption is not in question here.

Section 73.28 is in relation to the interference caused to the proposed station and does not involve interference to existing stations. The later interference, i.e., to the existing station, must be considered under the norms set down by Section 73.24 until such time that new rules or standards are promulgated. (1 RR 2d 701, 704-705).

It is evident that Appellant's argument is clearly without merit and unsupported by fact or law.

One other claim is made by Appellant in Argument IV. Appellant avers that the cases relied on by the Commission are not in point. In previously answering this charge, the Review Board stated:

> "Petitioner asserts that the three cases relied on by the Review Board in its Decision, Radio Ashland, Inc., supra; WSTV, Inc., supra; and Iowa Great Lakes Broadcasting Co., supra, can all be distinguished. These cases are said to have involved either the recoupment of lost service areas by the seeking of increases in power or the simultaneous filing of applications for increases in power by Class IV stations with interlocking co-channel interference problems. Obviously, the intent of the above policy is that Class IV stations should be permitted to increase power under circumstances other than those alleged to be involved in the cited cases. Were this not the case the Commission's intent that its policy be effectuated on a nationwide scale could well be frustrated. Moreover, it is noted that in each of the three cases in question interference would be caused by the Class IV applicants for power increases to other Class IV stations which had not previously applied for power increases and which were not simultaneously applying for power increases; in each of those cases the usual Class IV power increase condition was appended to the grant." (R. 257-258).

Once again, Appellant's claim must fail as being unsupported and without merit.

VI THE SUBSEQUENT GRANT OF POWER INCREASE TO KBIX WAS WITHIN THE CONTEMPLATION OF THE COMMISSION'S DECISION IN THE INSTANT PROCEEDING.

In its fifth and last argument, Appellant urges that due to the fact that Class IV station KBIX, Muskogee, Oklahoma (one of the Class IV stations involved in this proceeding) has, since the grant of KPLT's application, been granted an increase in power to 1 kw, conditions have so changed that the state of the record might preclude a just result. In support thereof, Appellant cites Flemming & McNutt v. Federal Communications Commission, 96 US App D. C. 223, 225 F2d 523 (1955); Enterprise Company v. Federal Communications Commission, 97 US App D. C. 374, 231 F2d 708 (1955). The short answer to this claim is that the cases cited by Appellant are clearly not in point and Appellant's contention is without merit.

The essence of both cases cited by Appellant rests in the fact that events occurred after the grants of the respective applications which were not contemplated by the Commission and which substantially effected the grounds upon which the applications were granted. For example, in Flemming & McNutt, supra, the Commission's decision was based in substantial part on the attitude of a partnership applicant toward certain trade practices of a newspaper publishing company in which the partners were stockholders, and one of the two partners died after the decision and pending appeal.

In the instant proceeding, the subsequent grant of KBIX's power increase was not such an event which was not contemplated by the Commission.

Clearly to the contrary, KPLT's application was granted with full awareness that KBIX or any of the other Class IV stations could seek power increases. In fact, KPLT's grant was conditioned on this premise.[7/] As the Review Board clearly noted:

> "The Class IV stations involved in the instant proceeding have not objected to a grant, nor have they attempted to intervene herein. Moreover, the impact of a grant of such Class IV stations is substantially diminished by the first condition attached to the grant herein." (R. 215-216). Emphasis added.

In face of the record, Appellant's claim is clearly without merit and must fail.

7/ The first condition to KPLT's grant reads as follows:

> "Permittee shall accept such interference as may be imposed by other existing 250 watt Class IV stations in the event they are subsequently authorized to increase power to 1000 watts." (R. 218).

CONCLUSION

For the foregoing reasons, KPLT respectfully submits that the Commission's decision, released January 10, 1964, should be affirmed.

Respectfully submitted,

/s/ B. Austin Newton, Jr.

B. Austin Newton, Jr.

/s/ Ray R. Paul

Ray R. Paul

/s/ Vincent J. Curtis, Jr.

Vincent J. Curtis, Jr.

Counsel for Intervenor KPLT, Inc.

815 Fifteenth Street, N. W.
Washington, D. C. 20005
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